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AUTHOR	Granat, Richard S.; And Others
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ABSTRACT

The primary objective of this study is to aid policy makers - state and federal officials, accreditation officials, and university administrators - in making decisions concerning the regulation of postsecondary external degree programs. The purpose of this project is to identify the legal and regulatory issues that the operation of these programs create and to recommend alternatives for the design of a regulatory framework that will permit experimentation and growth. The methodology employed consisted primarily of analysis of primary legal sources (statutory analysis; case law analysis; and the use of secondary materials such as law review activities) as well as books and studies on the external degree movement. The study is organized into seven sections: (1) a description of what is happening to traditional, accredited institutions of higher education; (2) definitions; (3) case of quality control of external degree programs and nontraditional study; (4) assessment of state legislation that might have an impact on external degree programs; (5) description of the role that the accreditation associations play in controlling the quality of postsecondary education, with an assessment of their capability to respond to external programs; (6) description of the present federal roles regulating external degrees; and (7) a summary. Supporting appendixes include a summary of the laws that govern out-of-state accredited institutions, and analysis of each state's incorporation requirements, accreditation association guidelines, and a resource bibliography. (Author/PG)

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LEGAL AND OTHER CONSTRAINTS TO THE DEVELOPMENT OF EXTERNAL DEGREE PROGRAMS

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by

1) Richard S. Granat, Project Director
2) William A. Kaplin, Legal Advisor
3) Denise Fort, Research Assistant
4) Jonathan Lash, Research Assistant
5) Judith Kincaid, Research Assistant

Volume I

Final Report

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The conclusions and recommendations in this study are those of the principal investigator and do not reflect the views of the Columbus School of Law, Catholic University, the National Institute of Education or any other agency of the United States Government.

PREFACE

This study was made possible by Grant No. NE-G-00-3-0208 from the Career Development Program of the National Institute of Education to the Columbus School of Law, Catholic University, which in turn, subcontracted to Richard S. Granat, the principal investigator.

William A. Kaplin, Associate Professor of Law, was Legal Advisor to the project and was of invaluable assistance in clarifying technical points and providing guidance and counsel to the project investigator and the research staff; he was also primarily responsible for completing the legal analysis in Sections 4.3 and 5.3.3 to 5.3.8 of this Report.

The field research was conducted by a team of law students at Catholic Law School, Denise Fort, Jonathan Lash, and Judith Kincaid.

Denise Fort was particularly indispensable. She was primarily responsible for completing the legal analysis in Sections 4.4 and 5.3.2 of this Report and prepared Appendix A; her efforts are greatly appreciated.

Eric E. Jackson, a management consultant specializing in innovative postsecondary education programs, provided insights on the management problems of academic institutions.

The author is grateful for the assistance of Dr. Morris Keeton, Provost of Antioch College who generously provided information on the problems that non-traditional academic institutions have experienced with state agencies and Stephen PLUMER [redacted], formerly Dean of DEVELOPING [redacted] Programs at Antioch who read the first draft in its entirety and provided another perspective on many points. We would also like to thank Nevzer Stacey, Government Technical Representative for the National Institute of Education for her encouragement and guidance.

Although many individuals contributed to the study, the conclusions and recommendations are those of the principal investigator and do not reflect the views of the Columbus School of Law, the National Institute of Education, or any other agency of the United States.

Although this investigation is limited in scope, it is hoped that it will stimulate further research and that the findings and recommendations contained in this report will prove helpful to policy-makers who are faced with making decisions on the design of education innovative postsecondary programs.

LEGAL AND OTHER CONSTRAINTS TO THE DEVELOPMENT OF EXTERNAL DEGREE PROGRAMS

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1.0 EXECUTIVE SUMMARY

1.1 Purpose of the Study

1.2 Methodology

1.3 Organization of the Study

1.4 Summary of Findings and Recommendations

1.0 EXECUTIVE SUMMARY

1.1 Purpose of the Study

The primary objective of this study is to aid policy-makers --state and federal officials, accreditation officials, and university administrators - in making decisions concerning the regulation of postsecondary external degree programs.

Our hypothesis is that the existing legal and administrative structure for regulating postsecondary programs does not anticipate the proliferation of external degree programs and other forms of non-traditional study. The purpose of this project is to identify the legal and regulatory issues that the operation of these programs create and to recommend alternatives for the design of a regulatory framework which will permit experimentation and growth.

1.2 Methodology

The methodology employed to conduct this study consisted primarily of analysis of primary legal sources, e.g., statutory analysis; case law analysis; and the use of secondary materials such as law review articles; as well as books and studies on the external degree movement.

In addition, a telephone and letter survey was conducted to solicit information from each state educational agency on their authority to regulate accredited institutions with their state. The survey was designed to verify each state's statutory authority for regulating external degree programs and to ascertain the attitude of state administrative agency officials toward innovative education.

The study was also augmented by a number of in-depth interviews with educators with experience in non-traditional education programs.

The project originally contemplated a field research phase which was designed to empirically verify whether there were in fact obstacles to the development of external degree programs created by the accreditation associations and state regulatory agencies. [illegible] [illegible] was deleted in the budget review process and as a result the

Because of limited resources, the only field research conducted were the two case studies which are based on interviews. Legal conclusions are based on an analysis of primary legal sources, such as state statutes and case law. Further research on the subject of this Report should include an empirical study of the constraints to the development of innovative education programs as experienced by institutions of higher education.

1.3 Organization of the Study

The study is organized into seven sections. Section 1.0 is a description of what is happening to traditional, accredited institutions of higher education. The purpose of this section is to provide a context for understanding the external degree movement. Section 2.0 is definitional. It describes four major types of external degree programs and institutions and relates them to the changes taking place in higher education. We argue in this section that the external degree movement is not merely an extension of earlier adult education efforts, but represents deep dissatisfaction with the higher education system as it is presently constituted and is an adumbration of coming fundamental changes in the delivery system for higher education in this country. Section 3.0 presents the case for quality control of external degree programs and non-traditional study. Section 4.0 is an assessment of state legislation which might have an impact on external degree programs. In this section we also analyze the limits of state power to regulate external degree programs. A model statute, prepared by the Educational Commission on the States, which is designed to provide a basis for state approval and licensing of postsecondary institutions and their agents, is analyzed in terms of its impact on external degree programs and non-traditional studies. Section 5.0 is a description of the role that the accreditation associations play in controlling the quality postsecondary education with an assessment of their capability to respond to external degree programs. We also assess the possibilities for reform of the accreditation associations through use of the judicial process. Section 6.0 is a description of present federal roles regulating higher education and an assessment of the federal government's potential for regulating external degrees. Section 7.0 is a summary of our findings and an analysis of the implications that result from them. Specific recommendations on the respective roles of the states, the accreditation associations, and the federal government are submitted.

Volume II contains supporting Appendices, including a summary of the laws of each state which govern and apply to out-of-state accredited institutions of higher education; an analysis of each state's incorporation requirements for colleges and universities; a copy of the model statute prepared by the Educational Commission on the States, accreditation associations guidelines, and a resource bibliography.

1.4 Summary of Findings and Recommendations

Our major findings are:

--The American higher education system is geared primarily to the 18-21 year old residential student. It is not designed to serve other large learner groups such as post-college age adults; those who must retrain in mid-career; and those who are faced with increased leisure time. (Section 2.0)

--Because of a declining birthrate, the number of enrollments in the 18-21 age group, is declining, which together with the impact of inflation has created a financial crises among private institutions of higher education. (Section 2.3) State appropriations to public institutions are also leveling off. Finally, federal assistance to institutions of higher education is declining. (Section 2.3)

--The external degree movement is not simply an extension of existing adult education efforts. The external degree is a response to societal forces which are impacting on the higher education system. The external degree is symbolic of fundamental changes now occuring in the higher education delivery system. (Section 3.0)

--The rapid growth of the external degree movement has created a need for quality control. Under financial pressure, non-profit and public accredited institutions have started external degree programs which are inadequate. Abuse of consumer rights by accredited institutions has been reported and the tendency is increasing. Although the problem of consumer fraud in higher education has existed for some time, the emergence of the external degree strains the existing regulatory system beyond its capacity. Unless a more effective regulatory framework is created which gives legitimacy to the external degree, it will be crushed by the attacks of traditionalists with a vested interest in existing educational practice. (Section 3.3)

The States

--There is little uniformity in state responses to higher education. State statutory schemes vary from absence of any mention of higher education to far-reaching legislation that assumes vast powers over higher education. In general, non profit, non-vocational, regionally-accredited institutions of higher education are often free of any government regulation. (Section 4.1)

--The attitude manifested by most states toward innovative education is at present one of indifference. Of those states which do in some manner supervise private higher education, the majority exempt accredited institutions, thus leaving whatever regulation that is to be done to a private group. In those states where statutory provisions exist for the regulation of private higher education, special provisions for innovative education are rare, and many administrative standards are obsolete and will retard the development of the external degree. (Section 4.2)

--It is becoming evident that some state educational agencies are restricting the activities of out-of-state institutions in order to protect the shrinking markets of in-state institutions. This is being done under the guise of "quality control." (Section 4.2)

--State regulation of higher education will be subject to the restrictions of the Commerce Clause of the U.S. Constitution to the extent that higher education activities can be characterized as "interstate" within the meaning of the clause. States' regulations in education may be invalid under the Commerce Clause if their predominant purpose and effect is to protect local economic interests at the expense of interstate commerce. States must treat interstate education activities in an even handed, non-discriminating manner. (Section 4.3)

--A state cannot require the registration of a foreign school whose business is exclusively (or almost exclusively) interstate, nor can a state exclude a foreign corporation engaged in interstate commerce except for the most compelling reason. (Section 4.3)

--In general, a state acting under its police powers, may regulate academic institutions in the public interest, subject to the limitations of due process law. Substantive due process requires that there be a manifest need which affects the health, morals, or safety of the public generally, and that regulations not be arbitrary, discriminatory, or otherwise unreasonable. Procedural due process requires that reasonable notice of violation must be given, there must be a hearing with the right to confront and cross-examine witnesses, counsel must be permitted, and a record must be made. (Section 4.4)

--There is an urgent need for uniform state legislation, to be passed in each state, modeled after the legislation proposed by the Educational Commission of the States (See Appendix C), with the following caveats: (1) The states should focus on the enforcement of administrative standards and refrain from mandating specific educational requirements; (2) There should be specific provisions that apply to innovative, external degree programs; (3) The accreditation associations should be relied on for judgments on the educational quality of a program, but should not be relied on for enforcement of administrative standards; and (4) States must give more deference than they have to the requirements of due process and the Commerce Clause of the U.S. Constitution. (Section 4.5)

The Accreditation Associations

--The regional accreditation associations provide too little regulation of higher education rather than too much. Membership in a regional accreditation association is based in large part on formal and structural criteria. Many of the standards employed by the accreditation associations are geared for traditional residential programs, imposing constraints on the development of external degree programs. There is a tendency for the accreditation associations to discriminate in favor of the traditional institutions, as opposed to external degree institutions, because of the large vested interest that the association's controlling membership have in traditional practices. (Section 5.2)

--The courts are not likely to intervene substantially into the substantive decisions of accrediting agencies, but can be expected to exercise some control to protect the public interest (5.3.2) under anti-trust, constitutional, and common law theories. All three theories, however, permit considerable judicial deference to accrediting agencies up to the point where an accrediting judgment appears to have substantial adverse impact upon the affected school or program. And then, under all theories, the accrediting agency can nevertheless prevail if its restraint or innovation is demonstrated to be "reasonable" in light of its own purposes and in light of public policy consideration. (Section 5.3)

The Federal Government

--Federal regulation of the quality of postsecondary education is limited. The Office of Education and the Veteran's Administration rely on the accreditation associations to determine the eligibility of nonprofit institutions of higher education for federal funds. The jurisdiction of the Federal Trade Commission does not extend to non-profit, eleemosynary institutions. There is no focus within the federal government for coordinating efforts to protect students from consumer fraud.

Recommendations and Implications of Findings

Many of the alternatives discussed in the body of the report (see generally section 7.0) require new legislation. It is recommended that the states quickly pass uniform state legislation which focuses on the enforcement of administration standards. It is also recommended that the Veterans' Administration approve only programs of study, as they do for proprietary, vocational schools, rather than approve institutions. It would also be desirable for the jurisdiction of the Federal Trade Commission to be extended to non-profit educational corporations. Unfortunately, there is much Congressional reluctance to give the federal government more power to regulate in the field of education. Therefore, it is proposed, in the alternative, that a new specialized agency be created to fill the need for quality control of external degree programs. Such an agency could be organized within the framework of the existing accreditation associations, such as a national commission of the new Council on Postsecondary Accreditation. If the accreditation associations fail to respond to the need for quality control of external degree programs, a new organization perhaps called the National Council of External Degree Granting Institutions, should be organized to serve the public. An agency oriented toward the consumer could publish program evaluations and rate institutions. It could develop and apply verifiable standards which measure the performance of an institution in objective terms.

Establishment of a new accreditation agency is the fastest way to fill a vacuum. Congressional passage of new legislation authorizing direct federal regulation of postsecondary education could take forever and may never happen. Without effective quality control, the quick buck artists and confidence men will move into the field, tarnishing it for everyone. A private, voluntary agency, organized along different lines than the existing accreditation associations, seems to be a modest and realistic proposal which is consistent with American practice and which could be implemented in a relatively short period of time.

2.0 THE STATE OF HIGHER EDUCATION

2.1 Introduction

2.2 Current Criticism of Accredited Higher Education

2.3 Financial Status and Cost of Higher Education

2.4 Enrollment Patterns

2.5 Productivity of Higher Education

2.6 Conclusion

2.0 THE STATE OF HIGHER EDUCATION

2.1 Introduction

This section of the report identifies significant trends in higher education which shape the legal issues which arise in the operation of non-traditional education programs. It is impossible to understand the external degree movement without an understanding of the forces affecting the traditional academic college or university. The impact of these forces on the financial status of accredited institutions of higher education, the productivity of traditional higher education, and the emergence of non-degree alternative educational systems as a consequence are explored. Section 3.0 is a discussion of the various kinds of external degree programs, categorizing them into four major program types, and presenting the rationale for quality control of external degree programs.

2.2 Current Criticism of Accredited Higher Education

The "new" criticism of higher education can be traced to the Report on Higher Education of the Newman Task Force on Higher Education, published in 1971.[1] Less than four years ago, the U.S. Department of Health, Education, and Welfare asked Frank Newman, a Stanford University administrator, to chair a task force on higher education. The findings of the none member task force have aroused more controversy than any similar effort in the history of American higher education, for it raised fundamental questions on the effectiveness of the higher education system from the point of view of the needs of society. Together with the work of the Carnegie Commission on Higher Education, and other recent studies on the effectiveness of institutions of higher education, a disturbing picture of established higher education emerges. Accredited higher education is said to be a secretive and oligopolistic enterprise, inefficiently serving the needs of society.[2] According to these sources, traditional colleges and universities and their constituent faculties and administrations, suffer from the following deficiencies:

> --They are organized primarily to serve the 18-21 college age group, resulting in the creation of isolated communities which are separate from the mainstream of society, staffed by insulated faculty who have never had positions of responsibility outside of the educational system.
>
> --They lack diversity of institutional mission, with every institution emulating the academic model of the great universities, oriented towards the discovery of theoretical knowledge, rather than the dissemination of practical knowledge and the development of skills.[3]

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[1] Newman, F., Chairman, Report on Higher Education, (1971).

[2] See generally, Jencks and Riesman, The Academic Revolution (1969); Ridgeway, The Closed Corporation (1968)

[3] See Hodgkinson, Institutions in Transition (1970)p Jencks and Riesman, at 25-26.

-- They overemphasize the liberal arts and the humanities, although there has been a clear shift in demand for career education programs which are designed to teach a person how to do something.4/

-- They have become large bureaucracies, which stress system-wide planning, and centralized administration. The sheer size of many multi-campus systems is eroding the flexibility, differentiation, and individual responsiveness which characterized higher education during the first part of this century. 5/

-- They limit access for women, adults, and minority groups and other types of students who could benefit from higher education. Rigid policies on residence requirements, the ability to transfer credits, insistence on full-time study, have become barriers and impose unnecessary hardships on major subgroups within the population. 6/

-- They encourage forms of financial subsidy and loan programs which are geared to the full-time, residential student and do not encourage sutdents to have experience outside of formal education. The need to keep dormitories filled and physical plants operating determines the kind of student financial assistance, rather than genuine market need.

-- They prevent the introduction of new technologies which would increase the cost/effectiveness of instructional programs. Cable TV, micro-fiche publishing, and programmed material are resisted by tenured faculty afraid of technological unemployment. 7/

-- They are not organized for performance and results. Budgets are based on cost, particularly in public universities, rather than outputs. 8/

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[4] See generally, Abramson, P., Career Education: Fad or Fundamental? The Growth in Elementary, Secondary, Post-Secondary and Proprietary Markets 1972-1977 (1972).

[5] See generally, Report on Higher Education, Supra, note 1, Chapter 6, Bowen, The Governance of the Multi-Campus University (1970).

[6] See generally, Report on Higher Education, Supra, Note 1, Chapters 10 and 11; Gould, Today's Academic Condition (1970); Commission on Non-Traditional Study, Diversity by Design (1973); Cross, "New Students and New Needs", in Higher Education (1972); Cross, "New Students in a New World," in The Future in the Making ed. F.W. Vermilye (   ); Medsker, L., and Tillery, P. Breaking the Access Barriers (1971).

[7] Diversity by Design, at 46.

[8] Drucker, Management: Tasks, Responsibilities, Practices (1974) at 174.

In their defense, universities claim that these deficiences are the result of inadequate financial resources, and that the lack of funds is the primary cause of its problems. On the other hand, it can be argued that the organization, financing, and structure of higher education are creating a financial crises, which is driving the nation's colleges and universities to bankruptcy. The next section documents the dimensions of this financial crisis.

2.3 Financial Status and Cost of Higher Education

Recent studies have begun to focus attention on the financial crisis in higher education. Earl F. Cheit, in a now famous study,9/ reports that on the basis of 41 on-site studies of colleges and universities, 71 percent were determined to be headed for financial trouble or are already there. The list of those found to be in trouble includes both public and private institutions, including some of the country's most prestigious universities. Since the 41 institutions selected in the Cheit study were not chosen as a random sample of all 2,729 institutions of higher education in the country, it does not mean that 71 percent of all schools in the United States are in financial trouble or headed for it or that 29 percent are not. Nevertheless, Cheit concluded that the group of schools headed for financial trouble included in the study was sufficiently representative to infer that it is likely that the gap between expenditure and income is universal among the schools included and is likely to be felt in varying degrees in the near future.

The Cheit study was completed by November, 1970, and utilized data for the years 1967-68, and 1968-69. A more recent and comprehensive study of the financial status of private colleges and universities was completed by William W. Jellema in September, 1973 entitled From Red to Black?10/The study was undertaken to assemble up-to-date hard financial data on all accredited private higher education, and

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[9] Cheit, The New Depression in Higher Education (1971) at 139. See also, Bowen, The Economics of the Major Private Universities (1968).

[10] Jellema, From Red to Black?The Financial Status of Private Colleges and Universities (1973).

all but twenty-nine of the nation's private, four-year, accredited institutions were surveyed. The response to the questionnaire was in excess of 75 percent and the author concluded that the institutions in the study appeared to be representative of all private institutions of higher learning.[11]

Jellema concluded that a large percentage of the nation's private educational institutions were in financial difficulty and that they are surviving by borrowing from endowment funds, cash flow, and cutting back new programs and unnecessary services. Projecting current trends into future years reveals that 254 institutions in the original study sample would completely deplete their liquid assets within ten years, and projecting nationally, out of a total of 762 private, accredited four-year colleges and universities, 365 would become insolvent during the same period.[12]

A study conducted in Texas indicated that, if the trend from 1963-64 to 1967-68 were to continue, by 1985 the cost per student (in constant 1968 dollars) in major independent universities in Texas would be $36,859 and the cost per student in senior (four-year) colleges in the state would be $17,074. If the percentage covered by tuition were the same in 1985 as in 1968, the student at a private university would be asked to pay $17,324 per year and the student at a senior college would be confronted with a tuition charge of $9,695[13]

A study of ten prestigious colleges and universities published in 1967 showed a progressive decline in annual operating surplus between 1961-66, and projected deficits by 1967[14]

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[11] Jellema, Ibid, at 167.

[12] Jellema, Supra Note 9 at 23, 24.

[13] Liaison Committee on Texas Private Colleges and Universities, "Pluralism and Partnership: The Case for the Dual System of Higher Education," monograph, p.41.

[14] Study of Rising Costs at Ten Universities, (1957), cited by Earl F. Cheit in The New Depression in Higher Education (1971).

Public institutions are faring only slightly better. In a study conducted by the Center for Research and Development in Higher Education at the University of California, it was found that twice as many states had a reduced proportion of the state budget for higher education as did states with an increased proportion. With the exception of a few states, the proportion of the state budget going to higher education will be no greater in 1980 than it is now. Most states are already at a funding plateau and others will quickly reach it. State universities, for the first time, are beginning to experience deficit operations as enrollment drops and fixed expenses continue.

What is happening is that costs have continued to rise at a much faster rate than revenue. Instruction costs are higher with no increase in productivity. Building costs are higher. Maintenance costs are increasing. Students and their parents continue to demand auxiliary services, and inflation is throwing all earlier estimates out the window. Most importantly the customer is disappearing: changes in enrollment patterns are underlying the financial problems.

2.4 Enrollment Patterns

Higher Education's financial problems stem from shifts in enrollment patterns which in turn are caused by basic demographic shifts in the population.

State colleges, for example, will reach a dreaded watershed in September as fewer freshmen show up than last fall, for the first over-all decline in first-year students in peacetime memory.[15]

Although the number of persons reaching the college age of 18 will not begin to taper off until the end of the decade, the proportion of high school graduates who finally choose college has declined steadily in past years, from more than 60 percent in the late 1960's to less than 58 percent this year.

Undergraduate enrollment decreased in private universities in 1971 by 1.5 percent and held for no gain in private four year colleges. In 1972 enrollment fell off still further in the private sector, declining 2.1 percent in private universities and 1.7 percent in private four year colleges.[16]

The National Center for Educational Statistics and the Carnegie Commission on Higher Education recently revised earlier enrollment projections.

The National Center reported that:[17]

- 637,000 fewer students are thought to have enrolled this fall than previously estimated. (1973)
- 578,000 fewer students are expected to enroll next fall than previously estimated. (1974)

The Carnegie Commission now foresees:

- 1.5 million fewer students in 1980 than originally estimated.
- 3.4 million fewer students in the year 2000 than originally estimated.

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[15] Peterson, I., "The Next Freshman Class: Shifting Pattern," The *New York Times*, May 5, 1974, p. 52.

[16] See generally, Jellema, *Supra* note 9, Chapter II.

See generally, Snell, Helene I., "Enrollment Trends in Higher Education," Research Currents, ERIC Clearinghouse on Higher Education, June, 1973' Peterson, Richard E. American College and University Enrollment Trends in 1971. Davis, Robert F. "Rate of Increase in College Enrollment Drops," in American Education 9 (1973) 29.

[17] *The Chronicle of Higher Education*, Volume VIII, October 1, 1973, Number 2.

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REVISED PROJECTIONS OF FALL ENROLLMENTS, 1972-74
(in thousands)

Enrollment	1972*	1973	1974	Percentage Change 1972-73	Percentage Change 1973-74
Total	8,265	8,370	8,500	+1.3%	+1.6%
Men	4,701	4,695	4,700	0	0
Women	3,564	3,675	3,800	+3.1%	+3.4%
Full time	5,647	5,699	5,800	+1.0%	+1.8%
Part time	2,618	2,671	2,700	+2.0%	+1.0%
Undergraduate and 1st professional	7,322	7,407	7,500	+1.2%	+1.3%
Graduate	943	963	1,000	+2.1%	+3.8%
Public Institutions	6,158	6,256	6,400	+1.6%	+2.3%
Private Institutions	2,107	2,114	2,100	0	0
4-year Institutions	6,473	6,512	6,600	+1.0%	+1.4%
2-year Institutions	1,792	1,858	1,900	+3.7%	+2.3%

* Final figures

SOURCE: NATIONAL CENTER FOR EDUCATIONAL STATISTICS

OLD AND NEW ENROLLMENT PROJECTIONS, 1970-2000
(in thousands)

Enrollment	1970*	1980	1990	2000	Percentage Change 1970-80	Percentage Change 1980-90	Percentage Change 1990-2000
Projections made in 1971	8,649	13,015	12,654	16,559	+50.5%	−2.8%	+30.9%
Undergraduate	7,443	11,082	10,587	14,123	+48.9%	−4.5%	+33.4%
Graduate	1,206	1,933	2,068	2,436	+60.3%	+7.0%	+17.8%
Projections made in 1973	8,649	11,446	10,555	13,209	+32.3%	−7.8%	+25.1%
Undergraduate	7,443	9,720	8,882	11,221	+30.6%	−8.6%	+26.3%
Graduate	1,206	1,726	1,673	1,988	+43.1%	−3.1%	+18.8%

* Final figures

SOURCE: CARNEGIE COMMISSION ON HIGHER EDUCATION

Underlying these enrollment projections are assumptions about the changing composition of the population. Ten years ago when colleges administrators couldn't build enough dormitory space, they should have been aware of the changing demographic pattern in the U.S. population:

-- The actual number of five-year olds dropped 15 percent between 1960 and 1970. These are the college youth of 1970 and beyond. 18/

-- The actual number of births dropped three percent between 1970 and 1971 and nine percent between 1971 and 1972. These are the potential freshmen of 1988 and 1990. 19/

-- The nation's birthrate is at its lowest point in history, at a rate below zero-population growth, and it has not yet stablized at that rate.

The Census Bureau now estimates a sharp drop in the number of college-age youth after 1982, almost paralleling the sharp rises during the 1960's. 20/

The most important fact about these enrollment projections is that they are based upon projections of the future number of typical 18-21 age college student. 21/ The projections do not account for the extension of higher education to new types of students and the possibility that continuing education throughout life could become an accepted pattern in our society.

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[18] U.S. Department of Commerce, Bureau of the Census. *Current population reports, population estimates and projections*. Series P-23, No. 476, February, 5.

[19] U.S. Department of Health, Education, and Welfare, Public Health Service, *Monthly Vital Statistics Report*, *provisional statistics*. December 26, 1972, 29 (10), 1.

[20] U.S. Department of Commerce, Bureau of the Census. Current Population Reports '*Characteristics of American Youth*: 1972'. Series P-23, No. 44, March 1973.

[21] See generally, Glenny, "The '60s in Reverse," in VII *The Research Reporter* 1 (1973).

These new students could include[22]

- those who could not afford the cost of higher education during the traditional "college Years;"
- post-college age adults for whom no educational opportunities were present at an earlier age;
- those who want to expand and enrich their understanding of specific subjects;
- those whose educational progress has been interruped by illness, military service, or other temporary moves;
- those who become technologically unemployed and must retrain in mid-career;
- those who are faced with increased leisure time;
- those whose racial or ethnic identity have prevented them from full participation in the traditional higher education system;
- those who are constrained by the needs of small children, elderly relatives, and the invalid;
- those who must move frequently in order to accompany spouses or pursue careers; and
- those who are in prisons or hospitals or confined by illness in their homes.

Unfortunately, traditional colleges and universities are not geared up to service these emerging student markets, which accounts in part for the increasing tendency of those who desire training in a variety of skills or in career education to attend proprietary and industrial schools. The Educational Policy Research Center at Syracuse reports that the rate of increase in enrollment in these so-called "peripheral" institutions has been greater than in higher institutions, and in the future it will be much greater[23]

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[22] See generally, Cross, "The New Learners" in On Learning and Change, P.65, (1973).

[23] Glenny, Supra Note 21 at 3.

2.5 Productivity of Higher Education

Historicially, most industries in the American economy have found ways to increase steadily the amount of output measures by a given amount of inputs--in other words, they have experienced productivity change. Furthermore, industries characterized by rapid growth have generally been those with rapid productivity changes. Using growth in credit hours as a indicator of growth in real instructional output, as June O'Neill has noted[24] there has been no productivity change in the production of higher education during the period 1930 to 1967,--and this despite the very high growth rates of higher education.

Higher education institutions, like mental health hospitals, prisons, welfare agencies are "service industries," and one characteristic of service industries is that with more resources, production does not necessarily rise; it may even fall. For example, as academic salaries have risen, teaching loads have dropped.

This general pattern of cost exists at a time when students and communities are demanding more and more from academic institutions. Having responded to so many demands in the past, universities are trying to respond to new constituencies while the faculty are not prepared to cut down on the older ones.

A consequence of these combined developments, in which higher education becomes more and more omnivorous of resources while it becomes less and less able to elicit community support is the situation that David Reisman has termed, "Collision Course."[25]

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[24] O'Neill, June, Resource Use in Higher Education, Trends in Output and Inouts, 1930 to 1967, (1971)

[25] See generally, Reisman, "Inflation in Higher Education," V5 McGill Journal of Educational (Spring, 1920). See also, Gartner A., and Ritsmann, F., The Service Society and the Consumer Vanguard (1971) for alternative ways to organize service institutions which depend on the consumer as a force in the production of services.

2.6 Conclusion

Accredited higher education, e.g., traditional colleges and universities, which represent the mainstream of postsecondary education, display all the characteristics of a dying and moribund industry. Highly fragmented, resistant to the introduction of technological innovation, and oriented towards the maintenance of an obsolete cost structure which fitted yesterday's need, rather than tomorrow's, the nation's colleges and universities, are slowly pricing themselves out of existing markets and literally going bankrupt.[26] During the latter part of this century accredited higher education as it has been known is being completely transformed in structure, in financing, in methods of instructional delivery, in mission and purposes, and in staffing and organization. Many institutions are simply going out of existence. Others are consolidating and new institutions are merging to fill the gaps which now exist. The clear direction of change is toward a broader, more flexible, more competitive system of postsecondary education. In the context of these fundamental changes, external degree programs are not a simple extension of adult extension education programs, but are the forefront of a movement to redefine higher education, its content, and method of delivery. The next section identifies and describes major types of emerging external degree programs and examines the need for quality control.

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[26] As this study is being edited, the Washington Post reported on September 1, 1974.

> "Across the broad swath of academia, many colleges and universities are pruning their faculty rolls in a last ditch effort to make ends meet in the face of sharply escalating costs and declining enrollments."
>
> Across the country, the reasons for the academic retrenchment are essentially twofold. Costs have escalated at a staggering rate...And there is a shortage of students. After a period of rapid expansion in the 1960's when post-war baby boom classes were passing through college, enrollments have stablized and in some cases are falling.

Barnes, B., "Big Question on Campus, Who Will Lose Their Jobs?" The Washington Post (September 1, 1974) B5.

3.0 THE EXTERNAL DEGREE MOVEMENT

3.1 What is an "External Degree"?

3.2 Types of External Degree Programs

    3.2.1 The Traditional Model
    3.2.2 The Technological Model
    3.2.3 The Examining Agency Model
    3.2.4 The "Rip-Off" Model

3.3 The Need for Quality Control

3.0 THE EXTERNAL DEGREE MOVEMENT

3.1 What is an "External Degree"?

The "external degree" is the latest "innovation" to hit the nation's colleges and universities. Faced with a financial crisis caused by declining student enrollments among the 16-21 age group,[1] and increasing demand by other population groups previously excluded from postsecondary education,[2] academic institutions are struggling to reshape their programs to respond to changes in the marketplace. Many of these changes are taking place under the euphemism of the "external degree" or "nontraditional studies". The new realities of the marketplace are demanding that the university develop an understanding of the needs, realities, and values of the student, and to look at the student as a client or a customer. Universities are being forced by financial pressures to identify the satisfaction of student needs, as distinguished from faculty needs, as their primary institutional goal. Thus, academic institutions are rethinking their answers to the questions: Who is the student? What is of value to the student? What are the students' unsatisfied wants? Where is the student? One result of this rethinking has led to the development of external degree and other non-traditional study programs.

The movement is growing very fast. The Commission on Non-Traditional Study surveyed 641 programs offered by 1,185 respondent institutions. The Commission's staff estimated that probably between 1,000 and 1,400 innovative programs were conducted by American colleges and universities in 1972. Most of the programs were highly unconventional and only 21 percent of the institutions studied were distinguished by a single non-traditional feature.[3]

A useful definition is the one provided by Cyril O. Houle in the leading work on the subject, entitled, The External Degree. An external degree is one awarded:[4]

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[1] See Sections 2.3 and 2.4.

[2] See Section 2.2.

[3] Commission on Non-Traditional Study, Diversity by Design, at 44.

[4] Houle, The External Degree, (1973) 16.

> to an individual on the basis of some program of preparation (devised either by himself or by an educational institution) which is not centered on traditional patterns of residential collegiate or university study.

Recognizing that this definition is a negative one, Houle points out that the only "common characteristic at present is a desire to open up the academic system and provide a wide variety of options for a student body no longer made up exclusively of young post-adolescents."[5]

To illustrate the range of activity possible within the external degree movement[6] and to illuminate the legal issues of control and regulation that may result, we have identified four basic types of programs: (1) the traditional model; (2) the technological model; (3) the examining agency model; and (4) the "rip-off" model.[7]

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[5] Id at.

[6] Some observers of the external degree movement, such as Carol Herronstadt Shulman, interpret the phase "external degree" broadly to include:

> "...a variety of programs designed to deal with acknowledged needs in higher education: greater access to postsecondary studies, more flexible curriculum offerings, and recognition of non-traditional forms of learning."

Shulman, "A Look at External Degree Structures," ERIC Higher Education Research Currents (November, 1972).

3.2 Types of External Degree Programs

3.2.1 The Traditional Model

The Traditional Model is an ironic label which we have selected to describe almost all present activity in the external degree field which are incremental reforms in the academic programs of traditional institutions of higher education. Although many of these programs are very innovative, and commonly include such features as waiver of residence requirements, provision for independent study, credit for life experience, flexible class scheduling, and the extensive use of lay professionals as faculty, they do not present radical alternatives to the present higher educational delivery system. They retain many of higher educations familiar characteristics; the use of academic credits to measure achievement and competence; high cost labor for instructional programs, and service to relatively small numbers of students. All such programs share the following common minimal characteristics: (1) the external degree program is sponsored by a nonprofit, regionally-accredited institution of higher education; (2) the program has been approved by the institution's faculty governance mechanism; (3) the program conforms to the regional accreditation association guidelines for non-traditional study programs; and (4) the primary purpose of the institution is operating traditional programs on its main campus.

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[7] John Valley, Director of the Office of New Degree Programs, Educational Testing Service, finds that the non-traditional approaches to academic degrees can be categorized into six major models.

--the administrative-facilitation model, which is a customary degree offered outside the central structure of the university to a specialized clientele, e.g., Bachelor of Science offered by the School of General Studies at Columbia University.

--the modes-of-learning model, which is a new degree pattern of learning and teaching, is responsive to a new clientele which is different from that which it customarily serves, e.g., Bachelor of Liberal Studies of the University of Oklahoma. - aimed at what clientele.

--the examination model, awards credits and degrees on the basis of student performance as evidenced by examination, e.g., New York State Regents Degree.

--the validation model, where an institution evaluates and assesses the student's total learning experiences, e.g., Westbrook College, Portland, Maine.

--the credits model, in which the institution does not itself offer instruction, but offers credit for which it sets standards and vouches for the quality of student programming. There is no American example of this model. A foreign example is the Council for National Academic Awards in England.

--the complex-systems model, results when various external degree programs are merged together to form an external degree system, e.g., Empire State College.

Valley, "External Degree Programs" in Explorations in Non-Traditional Study (1973) at 95.

The University Without Walls consortium, a cooperative venture of 20 institutions organized as the Union of Experimenting Colleges and Universities is one example of what we would label the "Traditional External Degree Program". Such practices as a fixed age group, a set time-frame, the classroom as the principal place of instruction, prescribed curriculum, and grades, are abandoned by colleges participating in the UWW program. Members of the Union are: [8]

> University of Massachusetts, University of Minnesota, Morgan State, New College at Sarasota, Northeastern Illinois University, University of the Pacific, Pitzer, University of Redlands (Johnston College), Antioch, Bard, Roger Williams, Shaw, Skidmore, Friends World College, University of South Carolina, Goddard, Chicago State University, Franconia, University of Alabama (New College), Hofstra University, Loretto Heights, Staten Island Community College, Shephens, Westminster, University of Wisconsin at Green Bay.

Each college maintains its own autonomy but subscribes to a set of organizing principles developed by the Union

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[8] See generally, First Report, University Without Walls, (1972).

The UWW allows each student to design his own educational program in cooperation with a faculty advisor. The educational programs becomes a contract between the faculty advisor and the student, and the contract becomes the basis for assessing that learning has taken place during the period of time that the student participates in the program. Students use a variety of learning experiences to achieve their objectives: regular course work; internships, apprenticeships, and field experiences; independent study and individual and group projects; travel; programmed material, casettes and other technological material. There is no uniform time schedule for completing the degree. Students are admitted through each individual participating institution and a review committee at each institution appraises the student's record of achievement and makes the decision about his degree award. Candidates for a degree are recommended to the Union for Experimenting Colleges and Universities. Degrees are awarded jointly by the union and a sponsoring college or university. Approximately 3,000 undergraduate students are presently enrolled in UWW programs.

Another example of a nationwide external degree program are the graduate degree programs of the University of Northern Colorado, a public university which is part of the Colorado State System. 10/ UNC offers a one-year master program for fully-employed adults in mid-career in such fields as business, public administration, curriculum and instruction, guidance and counseling. The format, schedule, and content of courses are designed to meet the special needs of certain types of adult students, such as U. S. military officers, government officials, and teachers. Courses are frequently held during the week-ends or in three to five day intensive seminars. Many of the faculty members are recruited from

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[9] First Report, Supra at 4.

[10] Center for Special and Advanced Programs, Catalog, (1973); Bisconti and Gomberg, The Impact of the University of Northern Colorado External Degree Program, unpublished manuscript (1974).

industry or government and have reputations as both practitioners and teachers. After consultation with an academic counselor, the student may arrange for independent study of practicum courses which translate practical experience into academic credit through on-the-job training or work-study programs. Continuous enrollment allows students to register for any course at any time. Nonsequential scheduling allows students to choose their courses in any sequence. Typically, all courses carry full credit regardless of where they are offered, because there are no on-campus residence requirements. The only requirement for admission to the various degree programs is an undergraduate degree from an accredited institution of higher education, Although only four years old, the program now has over 3,000 participating students in 33 locations distributed among 17 states as far distant from Colorado as Rhode Island, Florida, and the District of Columbia. Over 400 students have graduated from the program.

Both the UWW program and the UNC program are typical of the kind of non-traditional experimentation now being undertaken by traditional institutions of higher education.

3.2.2 The Technological Model

The technological model has been identified as a prototype external degree program but is distinct from others because it is a radical departure from all traditional postsecondary education, delivery systems. In the United States, there have been a number of attempts to change the basic instructional delivery system through the employment of technology; a well known American example is Chicago's TV College[11] and a recent effort is the University of Mid-America. All of these programs, including the University of Mid-America, are relatively limited in scope, program content, or both. The best example of the technological model is a foreign one--the British Open University. Because of its significance for the future of higher education and the apparent legal barriers to the establishment of a comparable system within the United States, the British Open University is discussed in some detail.

The Open University was established in 1969 by the British Government as a nationwide educational vehicle which would provide opportunities for fully employed adults to secure undergraduate and graduate education.[12] The Open University began operating in 1971, after a two-year development period, and initially served 25,000 students. It presently offers work towards a Bachelor of Arts degree which students earn by accruing six credits, each credit being awarded on the successful completion of one year. Eight credits qualify for an honors degree and students may, if they have the time, take two courses a year.

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[11] Described in Houle, The External Degree (1973) at III.

[12] The following description was derived from interviews with Anthony Mellor, Director, Open University Department, Harper & Row Publishers, Inc.; Ernest Hunter, Director for marketing, Open University; a site visit to the Open University in England by the senior project investigator at his own expense, notes on file, and review of the following secondary material: Open University, The B.A. Degree Handbook (1973); Open University (Annual Report) 1973; Wagner, "The Economics of the Open University," in 1 Higher Education 159 (1972); Nelson, "The Open University in the United States," 85 College Board Review (1972); Walsh, "The Open University: Breakthrough for Britain?" 174 Science 12 (1971); Brooks, "The First Year's Experience at the Open University," College Management 28 (March, 1972); Lester, "Britain's University of the Second Chance," 10 Continuous Learning 255 (1971); Lewis, "Course Production at the Open University," IV: The Problem of Assessment," British Journal of Educational Technology, 108, (1972).

The Open University employs concepts and technology that represent a radical departure from traditional higher education delivery systems:

- There is no teaching campus.
- There are no academic barriers to admission. A strong effort has been made to reach blue collar workers, and any man and woman twenty-one years of age or older may enter.
- The teaching system is technologically based. The primary mode of instruction is correspondence material supplemented by a variety of innovative methods such as radio, television, self-assessment tests, one-week residential summer schools, and computer-graded assignments.
- The whole system is managed by computer, including student records maintenance, student billings, and management of the student's academic program.

The information flow within the system is depicted in Figure 1-1 which follows.

There are five components to the Open University teaching system: correspondence material, television programs, radio programs, tutorials at local study centers, and summer schools. The first three items are impersonal; the last two involve direct student-teacher contact. An additional form of student-teacher contact is provided through counsellors who advise the student on any non-academic problems he may encounter.

At regular intervals the student receives a block package of correspondence materials containing written material and, where appropriate, slides, films, records or science kits for home experiments. The written material includes references to other reading, some self-test questions, and a guide to the relevant radio and television programs. The student is given assignments at regular intervals to be graded by a tutor or by a computer.

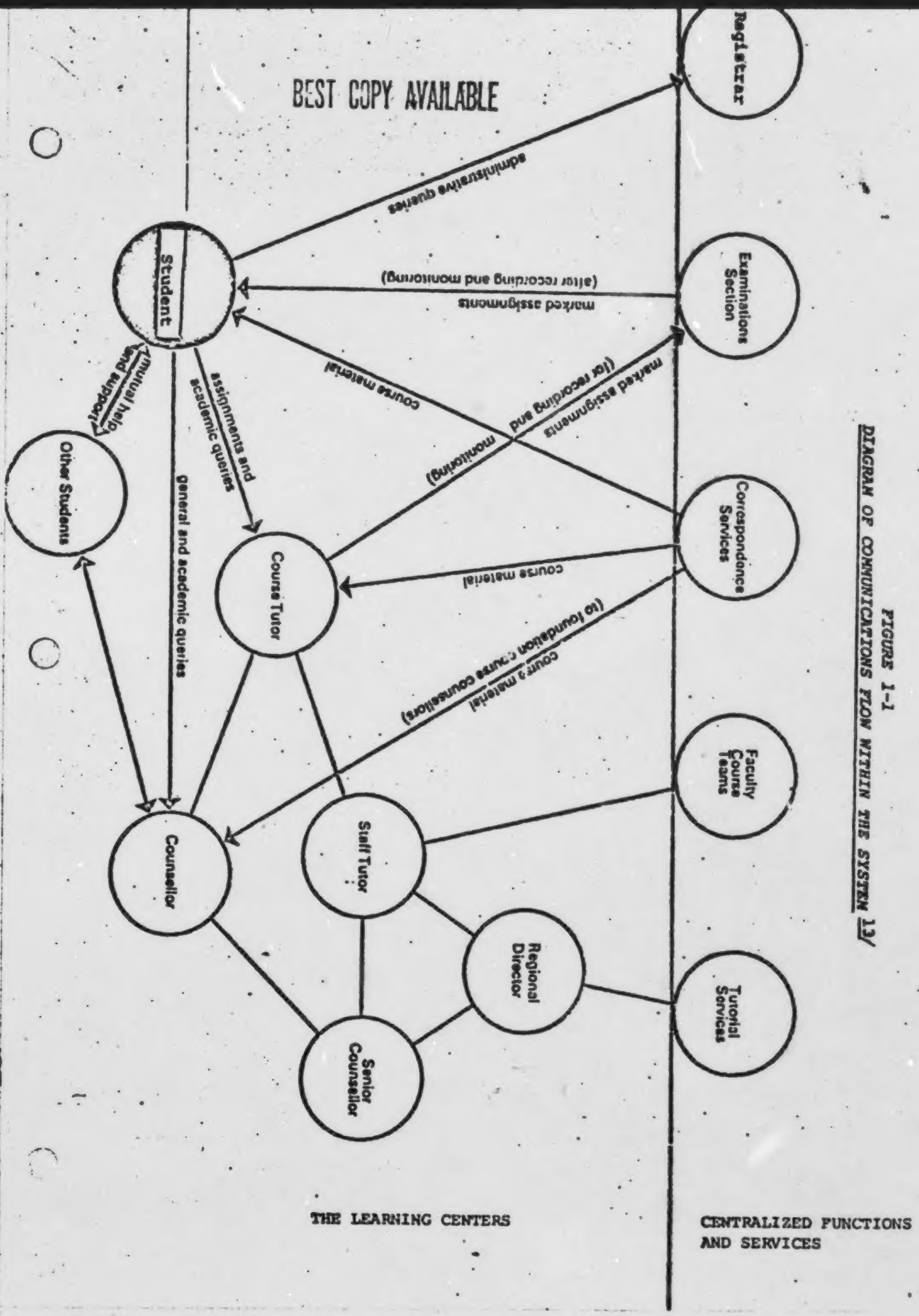
Registrar
Examinations Section
Correspondence Services
Faculty Course Teams
Tutorial Services
Student
Other Students
Course Tutor
Counsellor
Staff Tutor
Regional Director
Senior Counsellor
administrative queries
marked assignments
(after recording and monitoring)
course material
marked assignments
(for recording and monitoring)
mutual help and support
assignments and academic queries
general and academic queries
course material
course material
(to foundation course counsellors)
THE LEARNING CENTERS
CENTRALIZED FUNCTIONS AND SERVICES

FIGURE 1-1

DIAGRAM OF COMMUNICATIONS FLOW WITHIN THE SYSTEM[13]

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[13] From Open University, B.A. Degree Handbook (1973).

This technologically-based delivery system determines the cost structure for the whole program[14] The expense of the impersonal components is in effect a fixed cost. A television program costs as much to produce for one student as it does for fifty thousand. The only variable element in the correspondence package is the cost of printing and postage, and this is regarded as a variable cost in the University's budget. The ancillary material that might be sent with the packages (slides, records, etc.) is also regarded as a variable cost. Besides these, the only major cost that varies with the number of students is that concerned with the provision of personal tutorial services. Thus, there is a high ratio of fixed to variable costs in contrast to conventional universities, where the largest single item is a variable overhead-academic salaries-because it is directly linked to the number of students.

Direct per student costs are complicated to figure, but can be calculated by working out a cost figure for each item of direct cost in relation to total output. For example, the printing costs of the correspondence element will depend on the number of students; equally, the larger the number taking science, the greater will be the expenditure on the relatively expensive home experimental kits. In any case, the marginal costs of each extra student are relatively small and the average cost per student declines as the number of students increases. As a result, an Open University type system can handle relatively large numbers of students. The University is planning for 38,500 students in 1973, although this figure does not fully exploit the economies of scale that clearly exist in the Open University.

The average capital cost per student place (including land and equipment but excluding residence) at conventional universities is likely to be in the region of $15,000, depending on the particular site and the proportion of science and technology facilities to arts and humanities facilities.[15]

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[14] See generally, Wagner, Supra, note 12.

[15] Wagner, Supra note 12 at 178.

The capital costs of the Open University are given in its budget at 1970 prices, and this expenditure is expected to be its total capital costs in the foreseeable future. This capital cost is presently estimated at $15,000,000.[16] At conventional universities, there is some scope for economies of scale in capital expenditure as a certain proportion of capital costs is independent of the number of students. At the Open University, almost all capital expenditures are independent of the number of students. The main items of capital expenditure, such as site, offices, and curriculum development laboratories, are geared to the number of staff, not the number of students. The major capital item which is dependent on the number of students is the correspondence section, which is in charge of collating, packaging and mailing material to students and which is likely to comprise about 15 percent of total capital costs.

Therefore, the capital cost per student place at the Open University depends crucially on how many student places are allowed. The present figure is 36,500 student places, but many more could be enrolled with only a marginal increase in capital costs. Nevertheless, even with only 36,500 students, the total capital costs of the Open University are expected to be about $15 million in 1970 prices, producing a capital cost per student place of $445.00. Thus, the capital cost per student place at the Open University is about six percent of the cost at conventional universities. Moreover, student numbers would have to fall to 2,000 before capital costs per student place became equal to those at conventional universities.

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[16] The Open University, Annual Report, 1973.

In discussions with Open University officials and reviews of some of their internal documents, we have estimated the relationship of costs of the Open University in comparison with traditional universities:[17]

		Open University	British Traditional Universities
A.	Average current cost per equivalent undergraduate	$ 627.00	$ 2,350.00
B.	Capital cost per student place	$ 465.00	$15,000.00

The Open University has also made a comparison between the cost per graduate in conventional universities and the cost per graduate from the Open University. The cost per graduate is in excess of $12,000 in conventional English universities. To calculate the cost of an Open University graduate involves problematical assumptions about the future total student population and annual number of graduates. We assume that the Government policy on the number of students remains within a range of 36,000 to 42,000. The University has itself assumed that with an eventual stable total student population of 37,500, in the long run, it should be able to offer about 15,000 new places each year. A student population of 37,500 is likely to involve the University in current operating costs of about $23,087,000.00. There is no reliable information on the number of likely graduates each year. Since the Open University is an innovation, drop-out figures from existing correspondence schools are of little guide. The Open University is much more than a correspondence college; it offers an integrated system of teaching in which television, radio, tutoring, and correspondence all play a part. Nevertheless, assuming first that the total student population is 37,500, involving a recurrent annual cost of about $23 million, and secondly, that there is an annual student intake of 15,000, then there would have to be an 85 percent drop-out rate before the cost per graduate equals the $12,000 of traditional universities.

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[17] See also, Wagner, Supra Note 12 at 181.

The gap between the Open University and the conventional universities' figures is too large to be ignored, and is unlikely to disappear when ex-post figures become available. The Open University system has a substantial cost advantage over conventional universities, particularly when capital costs are taken into account. Even when an allowance is made for the possible lower research ratio in the Open University's cost, conventional university costs are still significantly greater than those of the Open University.

The Open University's fiscal advantages arise largely from its production techniques. The use of correspondence media, radio and televisions produces economies of scale which, above a certain minimum number, allow many more students per dollar to be taught.

Traditional universities are both highly capital intensive (because of faculty tenure) and highly vulnerable to shifts in student demand resulting in an enterprise with a high break-even point and inflexible product mix. The British Open University substitutes high capital investment for labor and thus introduces a new form of production. Early evaluation of the British Open University in England indicates that performance of students is comparable to students enrolled in traditional programs. An evaluation by the Educational Testing Service by the use of the British Open University materials at three American Universities; (University of Maryland, University of Houston, and Rutgers), concluded that: 18/

> "the British Open University methods and materials are generally appropriate for use in institutions of higher education in the United States and offer a viable alternative for colleges and universities that might be considering non-traditional programs."

In our opinion, the BOU represents a major type of future alternative postsecondary delivery system which incorporates external degree concepts.

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[18] Hartnett, R., Clark, M.J., Feldmener, R.A., Gieber, M.L., and Soss, N.M., The British Open University in the United States adaptation and use at three universities (1974) 95.

Unfortunately, there are major obstacles to its development. The first large scale attempt to introduce the British Open University in this country collapsed because of difficulties with the accreditation associations and state authorities.[19] A similar effort being sponsored by several mid-western universities and called the University of Mid-America, is being supported by the National Institute of Education and the Ford Foundation. The University of Mid-America is designed to serve students in a multi-state area, but does not begin to approach in scale the magnitude of the British Open University. Present efforts are limited to programs at the University of Maryland, Rutgers University, and Houston. All three programs are miniscule in scope serving all together less than 1,500 students.

Innovation on the scale of the Open University is unlikely to come forth from the traditional university system. Under present rules, such an institution could not easily operate across state lines and would not easily conform to the criteria and standards of the regional accreditation associations. As a result, it is impossible to raise the necessary capital for the long development period that is required.

3.2.3 The Examining Agency Model

The Examining Agency Model is a third type of external degree program, which deserves to be distinguished because in this model the institution does not provide any instruction.

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[19] Interview with Roger Middlekauf, Attorney, Washington, D.C., April, 1974, Notes on file.

The examining agency model has its antecedents in the University of London's external degree.[20] In 1836, the University of London was established solely to conduct examinations and confer degrees. Although called a University, it was only an administrative body with degree-granting power. Not until 1900 did the University begin to admit students and provide instruction. It presently "enrolls" approximately 35,000 students throughout the world and examinations can be taken at centers in the United Kingdom or overseas. The student pays only modest registration and examination fees. Today the University of London is considered the prototype model for institutions which are designed to separate the instructional function from the assessment function.

An American adaptation of the University of London program is the Regents External Degree Program of the University of the State of New York.[21] The University of the State of New York, established by the New York State Legislature in 1784, is the oldest state educational agency in the United States. It is governed by the Board of Regents and managed by the Commissioner of Education who serves as its president.

The Board of Regents determines the State's educational policies, incorporates colleges and universities, approves academic programs leading to college degrees, and establishes standards for most professions. The Board of Regents has the unusual distinction of being listed as a nationally recognized accrediting agency by the United States Office of Education.

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[21] See Houle, Supra Note 4 at 12.

[22] See generally, Nolan, "The New York Regents External Degree," 85 College Board Review (1972);

In 1970, after almost 200 years of existence, the Board of Regents established the Regents External Degree and shortly thereafter graduated its first students.[22]

The Regents External Degree is designed to enable independent students with college level knowledge to earn a degree without attending college. It is awarded by an academic institution which evaluates a student it has not directly taught and which has no campus, resident faculty, or students in a traditional sense. There are no requirements of admission, residence, or age.

Programs are offered leading to the associate in arts, associate in applied science in nursing, and bachelor of science in business administration. A bachelor of arts degree program with majors in many liberal arts areas has begun.

A student may earn credit towards a Regents External Degree in a variety of ways, including: (1) college courses from regionally accredited institutions of higher learning; (2) proficiency examinations; (3) military service school courses; and (4) special assessment of knowledge gained from experience, independent study, or other non-traditional approaches to education.

The Regents External Degree is a radical departure from existing practices. Formal admission requirements are eliminated, a variety of methods are used to assess that learning has taken place, and all learning methods are accepted as valid if they are effective.

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[22] New York State Board of Education, Regents External Degrees, (1973).

The New York model has already been adopted by the State of New Jersey, and there is evidence that other states may establish similar programs.

3.2.4. The "Rip-off" Model

The "rip-off" model is a covenient category which refers to all those degree programs which pretend to be legitimate external degree programs, but are in fact using the external degree to exploit students, offering little service for a high price. Such programs are akin to "diploma mill" operations. In the most complete study of degree mills ever published, Robert H. Reid estimate that there were at least 200 different degree mills operating in 37 different states.[23] In a more recent study, Lee Porter estimates that at least 50 degree mills still existed in 1971.[24] The "traditional" degree mills are a classic fraud. Such an institution purports to be accredited, have facilities, faculties, and offer instruction leading to all kinds of degrees up to the doctorate--all for a fee. They typically operate solely by mail, without staff or facilities of any kind other than a desk in the president's home. Porter reports that one degree mill, which awarded doctorates:[25]

> "had nothing other than a name and its entire campus was a desk in a corner of a real estate office with a secretary who was the faculty and staff."

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[23] Reid, R.H., American Degree Mills, (1959).

[24] Porter, L., Degrees For Sale (1972)

[25] Porter, Supra, note 24 at 33,34.

If courses are offered the time period is telescoped. Many degree mills advertise that a PhD. can be earned by mail in a matter of months. For example, one can purchase a PhD. from Florida State Christian College for $350.00 or if a northern state is desired, a PhD. is available from Marlowe University in New Jersey.[26]

Of course, these degrees have no educational value. None of the institutions are accredited by the regional associations and any careful employer will recognize them as worthless. The Educational Directory of the Office of Education takes a definite position on the value of degree mills.[27]

> In view of the inadequacy and utter worthlessness of degree mills and their disservice to American higher education, the U.S. Office of Education strongly urges the public to be on guard against organizations advertising degrees based solely on correspondence study.

During the last twenty years, federal and state agencies have tried to put the degree mills out of business and there is evidence that they are succeeding. Legislation has been passed in many states which prevents such institutions from operating. Unfortunately, just when it seemed that the degree mill problem was being solved, the "external degree" movement picked up momentum. Descriptions of external degree programs do sound similar to the types of programs described in the catalogs of degree mills. There is a great fear that the degree mill operators will seize on the current interest in the external degree as a way of expanding their operations. More seriously, some accredited, legitimate institutions, desperate for ways of expanding their tuition base may initiate external degree programs without the necessary planning and preparation. The result can be "rip-off" programs that tarnish the whole non-traditional study movement.

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[26] Porter, Supra, note 24 at 2-3.

[27] Office of Education, Education Directory, Part 3: Higher Education.

The possibility that the external degree movement will be exploited by degree mill operators and administrators of desperate accredited institutions threatened with extinction creates the need for quality control.

3.3 The Need for Quality Control

The rapid growth of the external degree movement has created a nationwide debate among professional academics on the need to control their unfettered growth. There is a great fear that as the distinctions between "legitimate" degrees and "external" degrees becomes vague, the opportunities for fraud and exploitation will become unmanageable. For example, JB Lon Hefferlin in Cut-Rate Credits and Discount Degrees, a report prepared for the Commission on Non-Traditional Study, states:[28]

> "Unless some distinctions are possible, the entire field of non-traditional study is likely to be as tarred for Americans by the degree mill business as conventional American degrees are already tarred for foreigners, whose more frequent contact with American higher education is with mail-order outlets for $90 doctorates. ---- No issue hold more long-term significance for the development of non-traditional study than this need for quality control."

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[28] Hefferlin, JBL, "Avoiding Cut-Rate Credits and Discount Degrees," in Planning Non-Traditional Programs (ed. Cross, Valley & Associates) 151 (1974).

Even the Commission on Non-Traditional Study, the staunchest advocate for the movement, warns that, "Charlatans in our midst are taking advantage of the flexibility of non-traditional education to increase their 'diploma-mill' types of operation."[29]

Other cautious observers of the movement include Edward T. Carr of the Division of Higher Education in the New York State Education Department, who has said that, "It's pretty difficult to tell here where the "Charlatanism ends and the integrity begins."[30] Lewis B. Maylew, Professor of Education at Stanford, says: "The current interest in external degrees and 'universities without walls' could well be a fad, fraud or romantic fantasy."[31] And Felix Robb, Director of the Southern Regional Accreditation Association, cautions:[32]

> "with the onset of non-traditional study, it is so easy for a Charlatan or a crook to set up something that has no campus, has no resources, has no faculty, has nothing but fraud in mind and a mailbox or possibly a hotel room that may be loaded with diplomas, and then operate on that kind of cheap basis. That's outright fraud, and there are cases of exactly that. But up the scale a way, are institutions that have extremely limited resources and a few front names that they've managed to pick up one way or another and so have quasi-legitimate status.
>
> Then you finally get some new institutions that have serious intentions of trying to build an exciting program on a highly different structure than we've been accustomed to. It gets more and more difficult in these gradations and shades of quality to determine what's legitimate and what's not."

The fear underlying the professional academic's demand for "quality control" is that the external degree will devalue traditional degrees. External degrees and other non-traditional forms of studies can be easily made synonymous with reduced standards.

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[29] Planning Non-Traditional Study Programs, 6 1974).

[30] Article, The New York Times, July 14, 1972, 36.

[31] Reported in Chronical of Higher Education March 13, 1973. pp.5.

[32] Id.

A second fear is that the external degree will become a device for abusing the rights of consumers. Even students at accredited institutions are increasingly facing an array of consumer problems in traditional programs which range from outright fraud, deception, misrepresentation, and false advertising, to ordinary breach of contract by failing to deliver promised educational services. Table 1, which follows, is an inventory of educational consumer concerns collected by the Office of Education. These kinds of consumer complaints could grow in severity as the external degree movement increases in momentum.

Table 1

Inventory of Educational Consumer Concerns

1. Degree mills.
2. Discriminatory refund policies.
3. Misrepresentation in selling, advertising, promotional materials, etc.
4. Abuse of Federal programs of student assistance.
5. Lack of available jobs upon graduation.
6. Non-delivery of item or service contracted for.
7. Lack of provision for due process, appeal concerning injustices, etc.
8. Arbitrariness in administrative policies and procedures.
9. Severe and unwarranted regulation of student conduct, living arrangements, moral behavior, etc.
10. Imposition of non-educational requirements, such as certain religious practices and customs, upon students who do not wish to fulfill them.
11. Unrealistic academic requirements and practices, such as inaccurate grading systems, residence requirements, etc.
12. Imposition of unwarranted and sometimes unspecified fees and other charges.
13. Changing requirements during the life of the student's "contract" with the institution (e.g. changing degree requirements mid-stream).
14. Raising tuition abruptly and without adequate notice.
15. Excessively punitive charges for infractions such as loss of library books, lab equipment breakage, etc.
16. Holding up transcripts, diplomas, etc., for unwarranted reasons.
17. Lateness in obtaining qualified instructors, textbooks, equipment, classrooms, etc.
18. A host of minor frauds, such as: poor food in dining halls, inadequate academic or personal counseling service, inadequate student health service, listing of non-existent faculty and courses in college catalogs, diversion of institutional resources to inter-collegiate athletics and other luxuries, ineffective management of endowment and other assets, forcing faculty to subsidize education through low salaries, etc.

19. Use of outdated or obsolete equipment, textbooks, laboratories, etc.

20. Showing favoritism to individual or certain categories of students (for example, preferred seating arrangements for seniors at football games).

21. Administrative tolerance of outmoded practices such as student hazing, ritualistic destruction of property, etc.

22. Lack of adherence to promulgated standards, procedures, rules, regulations, etc.

23. Unwarranted substitution of contracted items (such as qualified professors, dormitory rooms, etc.)

24. Taking advantage of students because of their social status by using them as cheap labor, regularly requiring them to stand in long lines for registration, etc.

25. Overdoing the in loco parentis concept by direct and illegal interference with individual freedoms and human rights.

Source: Educational Consumer Issues and the U.S. Office of Education, prepared by AIES for use by the Task Force on Educational Consumer Protection, January 26, 1973, Table I.

Consider the following hypothetical case and the consumer issues raised by it.

> An out-of-state institution advertises in a foreign jurisdiction to establish a masters degree program in Guidance and Counseling for teachers in elementary and secondary schools. The program consists of 10-12 intensive seminars over a two-year period. There are no residence requirements or admission requirements, except an undergraduate degree. At least 40% of the required degree credit can be earned in alternative ways, such as relevant work experience, employer-based training, or work done at other institutions. The program purports to prepare teachers for careers in guidance and counseling in school systems, and to meet in-service local school system training requirements for in-grade salary increases. A sequence of proposed courses is published, with a concentration in guidance at the Junior High School level. Frequent counseling is promised as part of the program.
>
> Six months after the program has occurred, the following events take place: The on-campus professor responsible for the Junior High School concentration transfers to another institution and the institution can't recruit someone to take his place. The head of the counseling and guidance department then changes the program to a general counseling and guidance major. A small minority group of professors in his department are opposed to off-campus programs, and boycott the out-of-state program refusing to provide counseling services to students. The same minority group of professors veto the selection by the department head of adjunct, part-time faculty. The students, aware of on-campus dissensions begin to drop out of the program until the enrollment falls below the minimum economic level required to break-even. The University. finding a negative cash-flow and loss situation, abruptly ends the program six months later, before any of the students have a chance to graduate. After the program closes, the students learn that the program was never accredited by the State Board of Education and that therefore, credits cannot be counted toward in-grade salary increases, and thus tuition is not reimbursable under state programs. Students trying to transfer their credits to in-state institutions learn that their academic records are no longer in the state, and are inaccessible at an academic institution two thousand miles away.

> Students trying to recover their money, learn to their dismay, that since the state did not have a registration procedure for foreign, non-profit corporations, there was no agent to sue; moreover when they complained to their accreditation association, they were told that the University in question was not within their region's jurisdiction and in any case, it was not a consumer rights agency.

This case, as a minimum, raises issues of consumer fraud and breach of contract; misrepresentation in selling and advertising; and failure to deliver services promised. Can the students get tuition refunds? How can they retrieve their academic records? Who has jurisdiction to police the academic institution to prevent the situation from recurring in another state?

Unfortunately, the problems of state negligence, regional inconsistencies, ineffective accreditation association, and consumer fraud in higher education, have existed for some time. The advent of the external degree is exposing the deficiencies of our existing institutions and the ineffectiveness of the present regulatory system.

The task facing policy-makers and legislators is designing a regulatory framework which provides equitable remedies for students exploited by allegedly non-traditional educational programs, while permitting genuine innovative alternatives such as the Open University to develop. Unless a more effective regulatory framework is created which gives legitimacy to the external degree movement the most important new innovations in higher education in a century will be drowned by the attacks of conservative academics with a vested interest in existing educational practice. The substandard external degree program operated by an accredited institution is the biggest threat to the external degree movement, for it will provide additional ammunition to those who would resist change. The remainder of this study explores the possibilities for such a framework and analyzes the roles and limitations of the states, the accreditation associations, and the federal government.

4.0 THE ROLE OF THE STATES

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4.0 THE ROLE OF THE STATES

4.1. State Regulation of Higher Education

4.1.1 Introduction

There is little uniformity in state responses to higher education. State statutory schemes vary from absence of any mention of higher education to far-reaching legislation that assumes vast powers over higher education. Nevertheless, in general it is the case that nonprofit, nonvocational, regionally accredited institutions of higher education are often free of any significant regulation.

Innovative progtams, including the external degree and programs that cross state boundaries, are almost never mentioned in state statutes. We have attempted to determine, from an examination of state statutes; from analysis of those few state regulations available to us; and correspondence and conversation with state educational authorities, the approach of the states to the regulation of external degree programs.

4.1.2 Regulatory Patterns

State authority over higher education is commonly asserted at the time of incorporation, or at the time a school begins to operate, grant degrees, or use collegiate names.

Regulation at the time of incorporation ranges from routine incorporation provisions that apply to every type of nonprofit corporation to substantive educational criteria that must be met to the satisfaction either of a special educational board or the regular corporation authority. These incorporation regulations are summarized in Volume II, Appendix A.

State regulation also takes the form of regulation applied as a condition of operation, degree-granting or use of a collegiate name. Typically, these regulatory schemes delegate responsibility for formulating standards to an educational board. The few requirements that are contained in the statutes concern such diverse subjects as registration, bond requirements, licensure of agents, financial resources, character of applicants, qualifications of faculty and physical resources. These licensing schemes also frequently contain penalties and less frequently, procedures for withdrawal of permits. Many state schemes which do contain developed plans for regulation are notable for their practice of exempting schools which are accredited institutions. At least twenty states exempt accredited institutions of higher education from state regulations.[1] The exemption is worded in a variety of ways: "Accredited by accrediting agency recognized by state;"[2] "accredited by regional accrediting agency;"[3] approved by Northwestern Association of Secondary and Higher Schools;"[4] "accredited and permitted to award degrees by state in which campus is located;"[5] "accredited by accrediting agency recognized by U.S. Office of Education;"[6] "which offer credits transferrable to schools accredited by accrediting agency recognized by U.S. Office of Education;"[7] or just "accredited"[8] without specifying by whom.

For example, the state of Florida has established a detailed regulatory scheme for nonpublic colleges,[9] which provides for a strong enforcement agency known as the State Board of Independent Colleges and Universities. Unfortunately, excluded from the licensing and regulation requirements of the chapter are:[10]

> "(c) Colleges accredited by an accrediting agency recognized by the United States Office of Education or the state board of education."

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[1] Alabama (T.52, §644(i) and (k); Alaska (§14.47. 130); Arizona; Florida (246.021(1)(c)); Georgia (32-2304(b)(g)); Idaho (33-2402(3)); Kansas (§72-4920(f)); Maryland (Art.77, §146); Mississippi (§75-60-5(f)); Nevada (§394.200(f)); New Mexico (§73-41-3); Oklahoma (T.70,§4103); Oregon (§351.710); Pennsylvania (T.24, §2732); Rhode Island (§16-50-3); South Carolina (§21-743(b)); Vermont (Title 16,#174, Section (c)); Virginia (§22-330-18); West Virginia (§18-26-13a); Wisconsin (§38.51(a)).

[2] Idaho, Pennsylvania, Rhode Island, Vermont, West Virginia, and Wisconsin.

[3] Oklahoma

[4] Oregon

[5] Virginia

[6] Alabama, Florida, Nevada, New Mexico, and South Carolina

[7] Kansas

[8] Maryland; Mississippi

[9] Chap. 246, Florida Statutes, See generally, Rules and Regulations of Florida, State Board of Independent Colleges and Universities, Chapter 6A-13, 1972-73.

[10] Chap. 246 Section 246.021(1)(c).

Similarly, the regulatory scheme in the state of Vermont provides that:"

> "This section shall not apply to an institution of higher education operating in Vermont but chartered in another state and accredited by the state applicable regional accrediting agency recognized by the state board...

This pattern of reliance on the decisions of private groups is of critical importance, because it means that in many cases an institution is totally free of state supervision once it achieves accreditation.

4.1.3 Foreign Schools

Many external degree programs and other forms of innovative education have substantial operations in states other than the state of their original incorporation, or than the state where degree-granting authority was first procured.

The effect of a state's regulatory scheme on a foreign school is unclear. Existing statutes are usually designed for state domiciled schools. Few statutes mention foreign schools, and they often do so in a correspondence-vocational school context that does not include most liberal arts institutions. It is frequently difficult to determine whether a statute is intended to be applied to a foreign school. Thus, it was unclear whether a Massachusetts statute which regulated the granting of degrees should be interpreted to apply to an out-of-state school which has a branch in Massachusetts, when the classes and students were in Massachusetts, but the degree came from the out-of-state campus. Chapter 69, Section 31A of the Massachusetts General laws provide that:[12]

> "No educational institution located within the commonwealth shall award degrees unless authorized to do so by the commonwealth."

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[11] Title 16, #174 Postsecondary educational institutions; degrees, name, Section (c).

[12] General laws of Massachusetts, Chapter 69, Section 31A, (1964,66).

The out-of-state institution argued that since it wasn't located within the state it was not subject to degree regulation by the commonwealth. To compound the confusion different states interpret similar statutory language differently, and information about these interpretations is difficult to obtain.

State statutes which require foreign corporations (corporations which are domiciled in another state) to register with a local corporation authority are another form of state regulation with a potential effect on innovative education. The registration requirement is an important method of gathering information about corporations doing business in the state, and of providing convenience in litigation against foreign corporations.

Appendix B provides a detailed account of the statutory provisions that apply to foreign corporations in each state.

4.1.4 Innovative Education

As part of our statutory search we attempted to determine which states had requirements which might have a restraining effect if applied to innovative education.

Vagueness and lack of specificity emerged as the most prominent characteristic of state statutes and regulations. A requirement that a school have "adequate facilities" could be interpreted in such a manner as to bar many innovative programs from operation, or could be interpreted in a manner sympathetic to the special aspects of innovative education. Because the administrative interpretations are so frequently unwritten one can conclude that the uncertainty of what to expect from a state board alone can exert a significant effect on the development of innovative education in a state. Although state statutes generally avoid specificity, when specific criteria are established they are generally insensitive to the problems presented by external degree programs, and in some cases could have a restraining effect on external degree programs if enforced. Minimum residence requirements for degrees present the most striking example of state regulation which stifles innovation. For example, the state of Arkansas requires that:[13]

> "No educational institution shall confer degrees upon students for mere correspondence courses, or upon any student who has not studied in residence for one (1) scholastic year.

Because of this provision a British Open University type program could not be operated in Arkansas.

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[13] Arkansas Statutes 64-1408.

Statutes which fix minimum endowments as prerequisites to operation could conceivably hamper innovative programs, especially when programs operate in many states, and must meet maximum standards in each state. An example of such a provision is that Pennsylvania requires that:[14]

> "A minimum protective endowment of at least five hundred thousand dollars ($500,000), beyond all indebtedness and assets invested in buildings and apparatus for the exclusive purpose of promoting institution."

This provision has already been used to exclude a nation-wide program from operating in the state of Pennsylvania because $500,000 of liquid assets were not on deposit within the state--a clearly unreasonable burden.[15] Faculty requirements, such as requirements that a school "[h]ave at least eight regular professors who devote all their time to the instruction of its college or university classes..."[16] or a requirement that 75% of the faculty be full-time preclude the operation of many non-traditional models.[17] Credit hour requirements for degrees commit states to traditional measures of learning.[18] Finally, requirements like that of Nevada,[19] that schools teach one year of constitutional law and history, but not reach any subject except a foreign language in a language other than English, testify to the basic obsolescence of most state attempts at quality control.

4.1.5 Conclusion

The attitude manifested by most state statutes towards innovative education is at present one of indifference. Of those states which do in some manner supervise private higher education the majority exempt accredited schools, thus leaving whatever regulation that is to be done to a private group. In those states where statutory provisions exist for the regulation of private higher education, special provisions for innovative education are rare.

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[14] College and University Standards Law, Act of May 7, 1937, P.L. 585,Section 312(1).

[15] See discussion pp. 4-6; 4-10.

[16] Pennsylvania College and University Standards Law, Act of May 7, 1937, P.L. 585, Section 312(2).

[17] Oregon Application Procedures and Standards for Approving Institutions for Degree Granting Authority; OLS 351.710 to 351.760 and OLS 351.990.

[18] Committee for Higher Education, "Policies and Procedures for Licensing and Accrediting Institutions of Higher Learning in Connecticut, "Section 10-330-18(c)(1970). See also Analysis of Virginia in Appendix A.

[19] Nevada Revised Statutes, 394.140, 394.150.

4.2 State Response to External Degree Programs

4.2.1. In General

In general, state regulation of higher education is weak, uncoordinated, and ineffective. Although there are several notable exceptions, such as New York, New Jersey, Massachusetts, Pennsylvania, and California, the majority of states have statutory schemes which have so many loopholes that violators can operate with impunity. As George Arnstein has pointed out, "it is easy to demonstrate that they are not working because if they were working, and if they were effectively enforced; then we would have no abuses because every offending school would be out of business...by having its state license revoked or suspended."[1] Foreign institutions offering external degrees complicate the situation and strain the existing legal and administrative machinery. Our field research (See Appendix A) revealed that very few states have promulgated regulations which specifically apply to foreign regionally-accredited degree granting institutions. J.B. Lon Hefferlin, in his report for the Commission on Non-Traditional Study, concludes that state regulation has had little influence on the development of external degree programs, and that "so far state regulation appears not to have seriously retarded the development of unconventional education."[2] Hefferlin's report was prepared in September, 1972. Since then it has been noted that there is increasing concern among state officials that academic institutions from other states will erode the established market enjoyed by their own in-state institutions.

The paradox is that while some states have no regulatory schemes other states have adopted irrelevant and restrictive criteria, such as residency requirements, length of programs, restrictions on curriculum, and restrictions on credit, which are being used to thwart external degree programs, particularly those operated by out-of-state institutions.

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[1] Testimony by George E. Arnstein, Before the Special Investigation Subcommittee of the Committee on Government Operations, House of Representatives, July 16, 1974, 3 manuscript notice.

[2] Hefferlin, J.B.L., "Avoiding Cut-rate Credits and Discount Degrees," in Planning Non-Traditional Programs 155 (1974).

We did not survey state officials to determine their attitude towards non-traditional study programs, for that was beyond the scope of the original study design, but contacts with state regulatory agencies revealed a growing skepticism towards innovative programs. Discussions with selected leaders in the external degree movement confirmed these indications that states are taking a much tougher stance towards the new programs.[3]

To illustrate the nature of the opposition and to provide a basis for legal analysis, we present two concrete cases of conflicts between academic institutions and state officials: The experience of University of Northern Colorado, a public, accredited institution operating in the state of Pennsylvania; and the case of Antioch College, a private, accredited institution domiciled in Yellow Springs, Ohio operating in the state of New York.

4.2.2 University of Northern Colorado in Pennsylvania [4]

In 1970, the University of Northern Colorado entered into a contract with the Pennsylvania Department of Community Affairs, a state agency, to provide instruction to local government employees in new town community development. The University had developed an innovative, nation-wide program, in consultation with the Office of New Communities Development of the U.S. Department of Housing and Urban Development, which was designed to bring to local government employees and local developers the latest advances in the art of developing new towns. The faculty consisted of nationally known experts in land planning, new town finance, architecture, social planning, and government, who together had designed an integrated curriculum which lead to an Masters of Arts (M.A.) in New Communities Development. The instruction format was a series of intensive seminars taught by this national faculty at various locations throughout the country. Approximately

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[3] Dr. Stephen Plummer, formerly Dean, Special Programs, Antioch College; Dr. Jules Pagano, Florida International University.

[4] The facts in this case example were provided by Dr. Barbara Mickey, Academic Vice-President University of Northern Colorado.

200 students were enrolled in the program nation-wide. The Pennsylvania program was designed for fully-employed government professionals who held various responsibilities in community development in state and local government departments in Pennsylvania. The State Department of Community Affairs had received funds from the U.S. Department of Housing and Urban Development under Title VIII of the Housing and Urban Development Act of 1968 and with this resource, they contracted with the University of Northern Colorado to provide training in New Communities development for approximately 60 local government employees. The funds were used to pay for tuition and fees.

When local universities in Philadelphia, such as Temple and University of Pennsylvania, learned that the State Department of Community Affairs had contracted with an out-of-state university, they were outraged. They complained to the Pennsylvania Department of Education and shortly thereafter, UNC received a letter from the state requiring them to comply with regulations issued by the Secretary of Education, or cease work on the contract already entered into with the Pennsylvania Department of Community Development .

Pennsylvania is one of the states that has a comprehensive statutory scheme. Article IX, as amended, states in part:[5]

> "The Department of State shall not issue a certificate of an authority to any foreign nonprofit corporation... (4) If the corporation is a college, university, theological seminary or other nonprofit corporation which, if formed under the provisions of this act, would require the approval of the Secretary of Education.... Whenever the Department of State shall receive an application for the certificate of authority from this corporation, it shall be the duty of the department to submit the application to the Secretary of Education and thereafter the procedure shall be the same as that heretofore prescribed by this act for the approval or disapproval of applications for the

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[5] Article IX, Section 902, Act of May 5, 1933, P.L. 289, (15 P.S. §7902).

> incorporation of similar domestic nonprofit corporations... It will be unlawful for the Department of State to issue a certificate of authority to such a corporation without the approval of the Secretary."

Essentially this means that foreign corporations must meet the same standards as those applied to domestic corporations.

The requirements of the Secretary of Education are stringent. Under the statute a degree granting institution must have a minimum protective endowment, of at least $500,000 beyond all indebtedness and assets invested in buildings and apparatus, for the exclusive purpose of promoting instruction. It must also have a faculty consisting of at least eight regular professors who devote all their time to instruction of college or university classes, or if the college is devoted to a specific subject in art, archaeology, literature or science at least three regular professors.

The standards prescribed by the Secretary of Education pursuant to a "Special Procedure for Incorporation of Educational Institutions Desiring to Confer Degrees,"[6] must also be met.

The standards include:

1. Establishment of the extent of need for the institution through an extensive survey by use of techniques and procedures acceptable to the Secretary of Education;
2. The "university" must consist of three units, at the minimum:
   - one unit must provide for the study of the arts and sciences at the undergraduate level (institutions offering only graduate programs may be exempted from this level upon the special recommendations of the Secretary of Education).

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[6] 15 P.S. §7211, 15 P.S. §7312.

- one unit must provide for programs at the graduate level in such fields as architecture, business, administration, education, engineering, health sciences, law, and social work "but not limited to these." Plans to offer doctoral programs in the existing curriculum must be at least formulated.

  In addition, a collegiate institution which seeks to be incorporated as a university "shall have had the status of regional accreditation as a college on the basis of initial accreditation and revisitation."

3. The institution must submit a detailed statement of its philosophy. The statement of goals must set forth what the institution regards as its long range mission and a statement of objectives must express specific means for accomplishing the mission.

4. The institution's board of trustees must have as its main function the legal operation of the institution.

5. "The administrative organization [must] reflect the relationships of constituent groups."

6. "Financial records [must] be maintained which are consistent with the record keeping systems of recognized quality institutions of higher education of a similar nature."

7. The undergraduate college, or colleges, of the institution must meet the standards prescribed for the undergraduate colleges.

8. An academic year must consist of class sessions for a period of at least thrity full weeks or its equivalent, exclusive of registration, examinations and holidays.

9. "A private organization or corporation desiring approval for university status [must] submit a formal application to the Secretary of Education... prior to a visitation to the institution. This application shall be filed one year or longer in advance of the time when operation as a university is desired." (Emphasis added.)

State representatives, obviously under pressure from local universities, indicated that UNC would not qualify under a literal interpretation of the guidelines, particularly, guideline eight (8) which requires that an academic year must consist of "class sessions for a period of at least thirty full weeks or its equivalent." Furthermore, many of the standards were originally designed to regulate new institutions which intended to establish traditional residential campuses within the state of Pennsylvania.

UNC, concluding that the cost of preparing a full application for approval would be prohibitive given the small size of the Pennsylvania program, decided to withdraw from the state. Ironically, local universities never began a similar program to fill the evident need, and most of the employees who participated completed their degree programs by commuting to a UNC center in Washington, D.C.

Thus, an out-of-state institution seeking to deliver a small, innovative graduate program to a select number of students for a limited time, were intimidated into closing their program because of heavy-handed bureaucratic regulation and self-serving local academic institutions purporting to act in the public interest.

4.2.3 Antioch College in New York

The Regents of the University of the State of New York is the oldest of the state regulatory bodies. It administers one of the most comprehensive systems of regulation and accreditation of any of the other states. Section 216 of the N.Y. Education Law grants power to the Board of Regents to prevent any higher education institution from operating a program without their consent. The Regents have power to grant absolute and provisional charters to academic institutions and such charters will not be awarded, unless:

> "(a) in the judgement of the Regents such an institution possesses resources and equipment available for its use and support, and sufficient and suitable for its chartered purposes, and maintains an organization of usefulness and character satisfactory to the Regents, and
>
> (b) ...the institution has submitted evidence in writing which, in the judgement of the Regents, makes it appear likely that the institution will be successful in achieving registration of its academic programs." [7]

The Regents have the power to incorporate educational institutions, and to give consent to the incorporation of educational institutions under the non-for-profit corporation law. Institutions not chartered by the Regents may not grant degrees or "use, advertise, or transact business under the name, university or college." [8]

Foreign "education corporations" are those which are "formed under laws other than the statute of this state, which, if it were to be formed currently under the laws of this state might be chartered by the Regents." [9] Foreign educational institutions may be:

> "(a) ... granted authority to conduct activities in this state by the Regents pursuant to this section and subject to such provisions, not inconsistent with this section, as the Regents may prescribe, or
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> (b) under the consent of the Commissioner, may receive authority under Article 13 (Foreign Corporations) of the non-for-profit corporation." [10]

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[7] N.Y. Education Law, Section 216.

[8] N.Y. Education Law, Section 224.

[9] N.Y. Education Law, Section 216(A)(1).

[10] Id.

Detailed regulations have become promulgated to implement the Regents' statutory mandate and these regulations are administered by the State Education Department. The State Education Department has administrative power to recommend the chartering of educational institutions, to conduct accreditation of these institutions on a five-year cycle, to approve new subject matter and degree programs, and to recommend disapproval if an institution's program plan is not consistent with the Regents' Statewide Plan for the Development of Higher Education, or if it does not satisfy any documented academic need.atisfy any documented academic need

In September, 1972, the State Education Department issued detailed guidelines for out-of-state institutions operating educational programs in New York State. External degree programs operated by out-of-state institutions raised two kinds of issues for the State Education Department:

> "(1) the evaluation and administrative review of programs of higher education offered within the State to residents in accordance with Education Law and (2) the impact of these activities on New York colleges and universities in accordance with the Regents' Statewide Plan for the Development of Higher Education."[11]

The guidelines require that out-of-state institutions of higher education seeking to operate in New York must secure the prior consent of the Regents in accordance with Section 22 of the Education Law, unless they formally affiliate with a New York institution of higher education which has been chartered by the Regents. Failure to secure prior consent constitutes a misdemeanor. The Regents may deny approval to an unaffiliated out-of-state institution if:

> (a) evidence is not offered that the educational quality and resources are equivalent to that of New York colleges and universities. This evidence may take such forms as accreditation of the institution by a nationally recognized, regional or specialized, accrediting agency, or other evidence acceptable to the Department, e.g., the result of an on-site evaluation by Department staff at the expense of the petitioning institution.

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[11] Guidelines for Out-of-State Institutions Operating Educational Programs in New York State, State Education Department, The University of the State of New York, September 1, 1972.

> (b) or the institution does not: "offer evidence of need and resources for its proposed program;" (c) or its long-range plans are not in accordance with the Statewide Plan for the Development of Higher Education.[12]

Special approval by the Regents is not necessary in the cases of programs operated by consortia of which New York higher institutions are members, so long as the New York institution has its own registered programs and has filed a declaration of academic need and responsibility for the program. If the New York institution has not filed a statement of academic need and responsibility it will be assumed that the New York institution is not responsible for the academic quality of the out-of-state institution and the procedures noted above will apply.

Finally Section 3.55 prevents any individual, association, co-partnership or corporation in New York which is not chartered by the Regents from offering a program leading to a degree to be conferred by an institution within or outside of New York State which is not accredited for degree purposes by an accrediting agency recognized by the United States Office of Education.

Approximately five years ago Antioch College, a private institution incorporated in Ohio, began offering external degrees at various centers away from its main campus in different parts of the country.[13] An offshoot of these early efforts has been the establishment of the Union for Experimental Colleges, a network of autonomous colleges which together comprise the University Without Walls program described in Part I of this report. The Union has become separately incorporated and has received its own institutional accreditation. A second result of this early innovation has been the establishment of the Antioch Network. The Antioch Network was conceived as a national program of individual educational centers, each providing a different education experience in a different part of the country, which would be independent of the Antioch physical campus, but dependent on a central administration for support and financing. A student might never set foot on the Yellow Springs Ohio campus. Each center in the network is monitored by an elaborate academic audit system which would assure quality control.

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[12] Id.

[13] The facts for this case were provided by Dr. Morris Keeton, Provost, Antioch College.

Still in the development phase, the Antioch Network was conceived as a new kind of national educational institution which could provide framework for learning and assessment for students in a variety of different contexts and in a variety of locations. The Antioch Network was designed to provide a framework for a variety of learning experiences in a single institutional setting, while incorporating the best innovations of the newer concepts being developed in non-traditional education, e.g., credit for life experience, competency-based learning, the mechanism of the student contract, etc.

As part of this network, Antioch is currently operating four degree programs in New York State, the first of which began activity in late 1969.

These programs consist of:

1. A B.A. program for physicians' associates, in collaboration with Harlem Hospital Center and Columbia University Colleges of Physicians and Nurses.

This program is a 24-month or longer baccalaureate program for persons with experiences as nurses or medical corpsmen to prepare as physicians' associates. It is designed as an intensive opportunity for career advancement for nonprofessional health workers from minority communities who have demonstrated superior job performance and potential for careers in the human services. The program has recently been accredited by the Council on Medical Education of the AMA, and the first class of five candidates was graduated in December of 1973.

The program is an unprecedented effort in New York State to improve the health of the Central Harlem Community through education and career development.

2. A B.S. degree program in education and community development in collaboration with a local nonprofit corporation known as The Teachers Incorporated (TTI).

This program offers paraprofessionals working in inner city schools and day care centers an opportunity to achieve a B.A. degree under the aegis of Antioch College. TTI staff serve as mentors, tutors, and faculty. They are supplemented by additional faculty resources recruited from other academic institutions.

3. A Masters in Education degree program in early childhood education operated through TTI. This program serves full-time teachers and depends upon a part-time faculty which have been drawn in part from such institutions as Bank Street College and New York University.

4. A Masters of Arts degree in media studies. This is a new program which is designed for fully-employed professionals who want post-baccalaureate work in media studies. The New York center is linked to a comparable center

in the Washington-Baltimore area and represents one of the major functional capabilities of the Antioch network. In addition to drawing upon local resources, some faculty among the two centers are shared, and the program receives central administrative support from Yellow Springs. This program has received separate accreditation from a North Central team.

All four programs presently enroll approximately 400 students. The programs have a number of common characteristics. They serve primarily students who live in New York, although students who live in neighboring states are eligible for participation, and students in other parts of the Antioch network may be admitted. All degrees are awarded by the Yellow Springs campus. Faculty from the whole Antioch network participate with local faculty in instructional and evaluation roles, and provide technical assistance to the individual programs.

Antioch had begun operating in New York prior to the issuance of the September, 1972 Department of Education Guidelines for out-of-state institutions. The Department of Education recommended that Antioch seek separate incorporation as a New York institution with a separate charter from the New York State Board of Regents. Antioch promptly filed the necessary papers. The New York Board of Regents granted a limited "permission-to-operate," pending the outcome of the decision on whether to grant a charter to Antioch-New York.

The State Education Department proceeded to make site visits, and to evaluate the Antioch program. On March 27, 1974, they completed their staff report to the New York Board of Regents. The staff's recommendation was that:

1. "The charter petition be denied on the basis that the need for another institution does not exist and that existing programs can, over a period of time, be assimilated by existing institutions."[14]

2. "The "permission-to-operate" status for Antioch College be continued for all programs other than the B.S. in elementary education which can be assimilated by Mercy College, "a local institution. "Department staff will (1) work with the programs to correct major weaknesses, and (2) continue to investigate the possible linkages of these programs with existing institutions."

The rationale and discussion developed by the staff to justify its recommendations stressed the following facts:[15]

-- The programs lacked adequate physical facilities, library facilities, the "collegial experience of a more broadly-based and longer-experienced faculty", and on-site administrative direction and support.

-- Part-time faculty raises serious "questions about advisement, collegiality, continuity, and rigor."

-- Antioch's central role in maintaining standards of quality is vague, and therefore it, "is questionable whether an out-of-state, necessarily geographically remote institution can, or is likely to be even inclined to, provide the faculty and administrative attention and continuous monitoring necessary to ensure a sound academic enterprise with promise of coherence, permanence, and service to the people of New York."

-- There is "little demonstrable need for a new institution when one considers space available in existing well-established institutions."

-- The staff indicated that there was great excess capacity among New York state institutions and reported that data showed that an additional 16,132 and 8,693 graduate students could be accommodated by the 23 institutions operating in New York City.

-- Antioch seemed to be in a weak financial condition because it has been experiencing operational losses since 1969.

The opinion letter indicated that Antioch should be permitted to operate its programs for a limited time only, until they can be affiliated with local institutions.

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[14] Letter to Dr. Morris Keeton, Provost, Antioch College, from N.Y. State Department of Education, March 27, 1974, on file.

[15] Id.

A written response, dated April 30, 1974, was submitted by Antioch to the Regents and a request made to be present at the Regent's meeting of May 22, 1974, when a decision would be made on the recommendation submitted by the State Department of Education.

The major points argued by Morris Keeton, Provost of Antioch, in the written brief and orally before the Board of Regents were that:

1. "The need for the Antioch programs had been acknowledged by the staff report of the State Department of Education, by the Regional Coordinating Council, and by the evidence of demand from enrolled and prospective students. Despite extensive and systematic efforts to find a New York City institution to sponsor the programs, none could be found. Equating "spaces available" in existing chartered institutions with the "lack of need" for an innovative institution such as Antioch is a fundamental error because the spaces are not equivalent. It would be analogous to federal government responding to an "over supply of limousines by measures restricting the production of new, small, sturdy, strong, and highly maneuverable vehicles which are economical for their users. Such action would be comparable to changing Antioch's charter because more conventional programs are not filling their quotas."

   "The academic soundness of the programs is not in dispute as acknowledged by the professional staff charged with the investigation."

   "Antioch provides significant financial and program support to the New York programs, and the investigating staff failed to report or overlooked significant facts which would affect a decision on Antioch's financial stability."[16]

On Friday, May 24, 1974, it was announced by the New York State Department of Education in a press release the decision by the Board of Regents, denied Antioch's request for a charter and granted permission to operate in the state for one year only, until local "program sponsors" could be found. The press release simply stated that "the need for another institution does not exist and that the four programs can be absorbed by existing institutions" and that "Antioch's role in maintaining standards of quality as 'vague.'"

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[16] Submission by Antioch College to New York State Board of Regents (1974).

On June 28, 1974, more than a month later, Antioch was notified of the Board of Regents decision in a formal letter from T.Edward Hollander, Deputy Commissioner for Higher and Professional Education to Morris Keeton. The letter consisting of a single paragraph simply stated:

> "In the judgement of the Regents, there is no need at this time in New York for an institution with the limited and specialized mission envisioned for Antioch-New York. The Regents have further concluded that the evidence of financial uncertainties shown on the reports furnished to us by Antioch College makes unacceptable the proposed method for ensuring the financial stability of Antioch-New York."[17]

The Antioch case dramatizes a number of important issues which will continue to arise as states seek greater control over non-traditional education:

-- Can a state exclude a foreign academic institution solely on the ground that in-state academic institutions have vacancies?

-- what are the limits of state power to regulate foreign academic institutions?

-- what are the limits of state power to regulate resident academic institutions?

-- What procedural requirements must be observed by states in regulating academic institutions, both resident and foreign?

The next section analyzes the legal restraints on state regulation of external degree programs and provides a framework for answering these important questions.

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[17] Letter from T. Edward Hollander, Deputy Commissioner for Higher and Professional Education to Dr. Morris T. Keeton, Provost, Antioch College, June 28, 1974, on file.

4.3 Legal Restraints on State Regulation of External Degree Programs: "The Commerce Clause"

Activities in "interstate commerce" constitute a well-known exception to state "doing business" statutes. It is well settled that a corporation of one state may go into another without obtaining the latter's permission if its activities are restricted to those in interstate commerce, and any statute of the latter state which obstructs or burdens the exercise of this privilege is void under the commerce clause of the U.S. Constitution.

The most significant external degree programs, such as the UWW consortium and Antioch College, and multi-state open-university type programs all operate across state lines. State legislators and education officials trying to control the quality of such programs must therefore be sensitive to the requirements of the commerce clause as they seek to regulate enterprises which are increasingly becoming national in scope.

The commerce clause in the United States Constitution grants Congress power "to regulate commerce...among the several States..."[1] As construed by the courts this language gives the Federal government very extensive authority to regulate, and to preempt state regulation of, activities in or affecting interstate commerce,[2] including higher education activities.[3] The major questions under the commerce clause today do not concern this clear Federal authority but rather the authority of the States, in the absence of federal action, to regulate activities in or affecting interstate commerce. To what extent does the commerce clause act as an implied, self-executing bar to state regulation of matters falling within the clause's scope but not regulated by Congress?[4]

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[1] Art. I,§8, #3. The full text provides that:

> The Congress shall have power... To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;...

See generally Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Schwartz, Constitutional Law ch. 4 (1972).

[2] See, e.g., Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 294 (1964). As to preemption, see, e.g., Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

[3] See Maryland v. Wirtz, 392 U.S. 183 (1968); Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970).

[4] See generally Dowling, "Interstate Commerce and State Power, " 27 VA. L. Rev. 1 (1940); Sholley, "The Negative Implications of the Commerce Clause," 3 U. Chi. L. Rev. 556 (1936).

4.3.1 Higher Education as "Interstate" Commerce

State regulation of higher education will be subject to commerce clause restrictions only to the extent that higher education activities can be characterized as "interstate" (as opposed to "intrastate") within the meaning of the clause. "Interstate commerce" is a comprehensive term. It encompasses "all commercial intercourse between different states and all component parts of that intercourse."[5] It includes the movement of persons and goods as well as information and ideas.[6] It is not limited to proprietary or business activities.[7]

Education activities have specifically been considered as "commerce" within the clause's contemplation. In *International Textbook Co. v. Pigg*,[8] a Pennsylvania corporation which operated several correspondence schools, sued one of its Kansas students for the balance due on a course of instruction in commercial law. The question was whether the action could be maintained in a Kansas court even though the plaintiff had failed to comply with various provisions of Kansas' foreign corporation statute. The Supreme Court held that plaintiff's business "was, in its essential characteristics, commerce among the States",[9] which would be unconstitutionally burdened if subjected to Kansas' registration requirements. The interstate characteristics of the correspondence school were described to be the:

> regular and, practically, continuous intercourse between the Textbook Company, located in Pennsylvania, and its scholars and agents in Kansas and other States. That intercourse was conducted by means of correspondence through the mails with such agents and scholars. While this mode of imparting and acquiring an education may not be such as is commonly adopted in this country, it is a lawful mode to accomplish the valuable purpose the parties have in view. More than that; this mode--looking at the contracts between the Textbook Company and its scholars--involved the transportation from the State where the school is located to the State in which the scholar resides, of books, apparatus and papers, useful or necessary in the particular course of study the scholar is pursuing and in respect of which he is entitled, from time to time, by virtue of his contract, to information and direction.[10]

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[5] *Dahnke-Walker Co. v. Bondurant*, 257 U.S. 282, 290-91 (1921).

[6] *Furst v. Brewster*, 282 U.S. 493, 497-98 (1931); *Western Union Tel. Co. v. Pendleton*, 122 U.S. 347, 356 (1837).

[7] *Edwards v. California*, 314 U.S. 160 (1941); *Caminetti v. U.S.*, 242 U.S. 470, 484-45, 491-92 (1917).

[8] 217 U.S. 91 (1910)

[9] *Id.* at 106.

[10] *Id.*

Many of the current and projected innovations in higher education would rather clearly shade into this general conception of interstate commerce, *e.g.* programs relying wholly or partly upon interstate mails, radio or television communications, computer hook-ups, or transient instructors; colleges with branch campuses in more than one state, where there are patterns of interaction between the campuses; colleges or programs "without walls" whose students and personnel engage in educational activities in an interstate context. More localized operations with more firmly established physical locations may also shade into the interstate category to the extent they solicit consumers (students) in an interstate market, have a student body which commutes to and from other states on a periodic basis; have cooperative instructional agreements or pooling-of-resources agreements with schools in other states; or have business and management operations (*e.g.* alumni offices, recruiting or guidance centers, management consultant services) dispersed interstate.

Most such institutions and programs, of course, are not likely to be considered by the courts as purely interstate.[11] The problem is not simply one of determining whether education is, or takes place "in", interstate commerce. Higher education today is a diverse mixture of interstate and intrastate operations and transactions, and it is important under the commerce clause to separate the interstate from the intrastate aspects of each regulated institution or program. While this may be difficult in the abstract, it is usually manageable in concrete cases.[12] If the predominant portion of the regulated institution's activities can be characterized as interstate, or if the particular activity or transaction being regulated is interstate, the commerce clause poses a potential limitation on the state's regulatory power.

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[11] *Cf.* *International Textbook Co. v. Pigg*, *supra*.

[12] *See*, *e.g.*, *Eli Lilly & Co. v. Sav-On Drugs*, 366 U.S. 276 (1961), where the Supreme Court distinguished between the intrastate and the interstate activities of a foreign corporation engaged in interstate commerce. (See the discussion of the case under Point IV, *infra*.) Activities identified as intrastate included the maintenance of an office within the state, the assignment of a sales and office staff to work within the state, and the use of such employees to promote sales between retailers and wholesalers located within the state.

4.3.2 Discrimination Against Interstate Enterprises

It is clearly established that state regulations may not single out and discriminate against interstate commerce or enterprises of extrastate origin in favor of intrastate commerce or enterprises.[13] Thus if a state were to impose more burdensome requirements upon (or grant fewer privileges to) higher education institutions or programs engaged in interstate commerce than it does upon those operating purely intrastate, or if it imposed move burdensome requirements on (or granted fewer privileges to) foreign educational corporations than upon domiciliaries, the regulations would likely contravene the commerce clause. States must treat interstate education activities in an evenhanded, non-discriminatory manner.

4.3.3 Protection of Local Economic Interests

Where a state's regulations are applied in common to both inter and intrastate enterprises in a particular field, they may nevertheless be invalid under the commerce clause if their predominant purpose and effect is to protect local economic interests at the expense of interstate commerce. The leading case is Baldwin v. Seelig, where New York State sought to apply its minimum purchase price regulations to a New York milk dealer purchasing milk in Vermont. The Supreme Court unanimously invalidated this application of the law because "the avowed purpose of the obstruction, as well as its necessary tendency, is to suppress or mitigate the consequences of competition with the products of another state or the labor of its residents..."[14]

While economically based state regulations are thus highly suspect under the commerce clause, they are not invariably invalid. In Milk Control Bd. v. Eisenberg Farm Prod.,[15] for instance, Pennsylvania applied licensing, bonding, and minimum purchase price regulations to a domiciliary milk processer buying in-state for shipment out-of-state. The Supreme Court upheld the regulatory scheme because it promoted local interests in fair-dealing and general economic well-being by aiming primarily at local industry and only incidentally burdening interstate commerce. But when the state's regulatory involvement is more clearly based upon economic protectionism or has more substantial anti-competitive effects--in short, where the regulation is "imposed for the avowed purpose and with the practical effect of curtailing the volume of interstate commerce to aid local economic interests"--the regulation will fall under the commerce clause.[16]

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[13] See, e.g., Hale v. Bimco Trading Co., 306 U.S. 375 (1939); Welton v. Missouri, 91 U.S. 275 (1876). Cf. Dean Milk Co. v. City of Madison, 340 U.S. 349 (1951) (state regulation found to discriminate against interstate commerce even though it also applied to some intrastate commerce).

[14] 294 U.S. 511, 522, 527, (1935). See also Polar Ice Creame & Creaming v. Andrews, 375 U.S. 361 (1964) (Florida milk purchase and allocation scheme unanimously invalidated on authority of Baldwin).

[15] 306 U.S. 346 (1939).

This principle would have its clearest application to higher education in situations where a state seeks generally to restrict the number of new schools or programs, or specifically to restrict the number of innovative schools or programs, establishing operations within the state. Even though such regulations applied alike to in-state and foreign institutions, their application to the latter would be constitutionally suspect if based primarily upon economic anti-competitive considerations. In H.P. Hood and Sons v. DuMond, for example, a Massachusetts dairy corporation operated three milk receiving depots in New York at which it purchased milk from New York producers and shipped it to Massachusetts for sale. When the corporation applied to the New York Commissioner of Agriculture for a license to establish a fourth such depot, he rejected the application. The ground for denial was the Commissioner's inability to make the required statutory finding that "issuance of the license will not tend to a destructive competition in a market already adequately served..." The Supreme Court overturned the Commissioner's decision under the general principle that "the State may not promote its own economic advantages by curtailment or burdening of interstate commerce."[17]

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[16] H.P. Hood & Sons v. DuMond, 336 U.S. 525, 530-31 (1949) (5-4 decision distinguishing Eisenberg, supra.) See also Polar Ice Cream & Creamery, supra note 10, a later dairy case where the Court emphasized the same point: "[T]he State may not, in the sole interest of promoting the economic welfare of its dairy farmers, insulate...[its] milk industry from competition from other States." Id. at 377.

[17] H.P. Hood & Sons v. Dumond, supra note 11, at 532, citing Baldwin v. Seelig, supra note 10. See also Buck v. Kuy Kendall, 267 U.S. 307 (1925), where the Court invalidated a state refusal to issue a certificate of "public convenience and necessity" to an interstate common carrier because the territory where the carrier planned to operate was already adequately served.

4.3.4 Validity of State Regulation

So long as the state avoids the pitfalls described in Points 4.3.2 and 4.3.3, it may exercise considerable regulatory authority, under its police powers, over higher education operations touching upon or affecting interstate commerce. The general rule, reaffirmed by a unanimous Supreme Court in 1970, is that:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.[18]

The promotion of local health and safety is clearly a "legitimate local public interest" under this rule.[19] So too is prevention of "fraud, misrepresentation, incompetence, and sharp practice," and promotion of "responsibility and fair dealing"[20] interests particularly applicable to regulation of higher education. But as Point 4.3.3 above suggests, economic interests are not always legitimate. The Court generally distinguishes between economic and other state interests, as *Hood*, *supra*, explains:

> [The] distinction between the power of a State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce, and its lack of power to retard, burden or constrict the flow of such commerce for their economic advantage, is one deeply rooted in both our history and our law.[21]

While some interests generally characterizable as "economic" may retain legitimacy even under this standard,[22] they are not likely to be weighed as heavily by the courts as interests in health, safety, and fair-dealing.

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[18] *Pike v. Bruce Church*, 397 U.S. 137, 142 (1970). *See also* *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945).

[19] *See, e.g.*, *Huron Portland Cement v. Detroit*, 362 U.S. 440 (1960) (health); *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938) (safety).

[20] *Robertson v. Calif.*, 328 U.S. 440 (1946); *Union Brokerage v. Jensen*, 322 U.S. 202 (1944); *see also* *California v. Thompson*, 313 U.S. 109 (1941) ("Fraudulent or unconscionable conduct... is peculiarly a subject of local concern and the appropriate subject of local regulation").

[21] *Id.* at 533.

[22] See generally Point III, *supra*. Compare *H.P. Hood & Sons v. DuMond*, *supra* note 11, at 552-555 (Block, J., dissenting) and 569-573 (Frankfurter, J., dissenting).

Moreover, even these latter interests may be scrutinized by the courts to determine their strength in the context of a particular case. It is not enough that the State put a legitimate label on its alleged interest; the interest must be real and demonstrable,[23] and it must not be invoked to justify what is actually an attempt to protect local economic advantage.[24]

Once a legitimate state regulatory interest is identified, and evaluated, the next step is to trace the nature and extent of burden which the regulation imposes upon interstate commerce. If, for instance, a state were to regulate certain aspects of higher education to promote fair dealing, the strength of the state interest would be weighed against the burden which the regulation places on the interstate operations of the regulated programs or institutions. The heavier the burden, the more likely the regulation will be invalid under the commerce clause even if it promotes a strong state interest.[25]

The Supreme Court has permitted states a wide range of authority under the legal formulation set out in this Point. Usually the state is best off if its regulation is premised upon some local event which can be segmented from purely interstate activity and separately identified as an appropriate subject of state regulation. In *Eli Lilly v. Sav-On-Drugs*,[26] for instance, the Court held that a foreign corporation doing interstate business can be required to register in a state where it also does a substantial amount of intrastate business. The corporation's intrastate and interstate operations were viewed as separable, and the substantial intrastate business was considered appropriate for state regulation which the corporation could not "escape...merely because it is also engaged in interstate commerce."[27] But in an earlier case cited approvingly in *Eli Lilly*, *International Textbook v. Pigg* (see Section 4.3.1 above), where the foreign corporation's local business was insubstantial and merely incidental to its interstate business, registration requirements were held invalid.

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[23] See *Southern Pacific Co. V. Arizona*, *supra* note 13.

[24] *H.P. Hood & Sons v. Dumond*, *supra* note 11, at 538; *See Dean Milk Co. v. City of Madison*, *supra* note 9; *Collings v. New Hampshire*, 171 U.S. 30 (1898).

[25] *See Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

[26] 366 U.S. 276 (1961).

[27] *Id.* at 279.

Similarly, in California v. Thompson,[28] the Court permitted the licensing and bonding of a local transportation agent selling interstate trips because he was not engaged in the interstate transportation itself and licensing him did not restrict the interstate flow of traffic. In Union Brokerage v. Jensen,[29] the Court permitted the licensing of a foreign corporation engaged in custom house brokerage of foreign commerce because the corporation had "localized its business"[30] and Minnesota had a "special interest... brought into play by Union's localized pursuit of its share in the comprehensive process of foreign commerce"[31] And in Robertson v. California,[32] the Court permitted licensing and bonding of insurance agents representing foreign corporations because the regulations applied only to agents acting within the state and the state had a "special interest" in the agent's localized pursuit of his phase of the interstate insurance business.

These cases illustrate the breadtn of authority a state retains under the commerce clause to regulate higher education, including foreign institutions establishing programs or appointing agents in the state. But the legal formulation set out in this Point does contain limits which narrow the state's authority even where it has met the requirements in Points 4.3.3 and 4.3.4 above. In particular, a state apparently cannot require the registration of a foreign school whose business is exclusively (or almost exclusively) interstate[33]. A state cannot entirely exclude a foreign corporation engaged in interstate commerce except for the most compelling reasons.[34] Any financial burdens which a state imposes upon interstate business must be "sufficiently small fairly to represent the cost of governmental supervision"[35] of the enterprise entering the state, and other burdens must be limited to those necessary "for the protection of the local interest affected..."[36]

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[28] 313 U.S. 109 (1941).

[29] 322 U.S. 202 (1944).

[30] Id. at 210.

[31] Id. at 212.

[32] 328 U.S. 440 (1946).

[33] International Textbook Co. v. Pigg, Point I, supra. See generally Annot., 92 ALR 2d 522 (1963). But see Fry Roofing Co. v. Wood, 344 U.S. 157 (1952) (state may license common carrier engaged exclusively in interstate commerce when there is no discretion to deny license and no burdensome conditions attach); Robertson v. Calif., supra note 15.

[34] Robertson v. Calif., supra note 15, at 449, 459-60; Sioux Remedy Co. v. Cope, 235 U.S. 197, 201-04 (1914); cf. Edwards v. Calif., supra note 7.

[35] Union Brokerage v. Jensen, supra note 15, at 210.

[36] Robertson v. Calif. supra note [illegible], at 459; see Dean Milk Co. v. City of Madison, supra note 9.

4.4 Legal Restraints on State Regulations of External Degree Programs: Due Process of Law

4.4.1 Substantive Due Process

State licensing and regulation of higher education raises some of the most fundamental questions of American legal and political thought.[1] The proliferation of state controls has raised problems of fairness, protectionism, academic freedom, and repressiveness, yet often important consumer interest are denied the protection of the state that they require.

This discussion treats questions of the legal limits, other than the commerce clause limits discussed above, on a state's power to regulate private higher education. These limits, unlike those under the commerce clause, do not depend on a finding that a school is engaged in interstate activity. Specific legal criteria and their application to existing and new schools are explored; problems arising from the nature of the authority given to an administrative body, and the problem of granting power to private groups is considered; finally, the procedural safeguards that clothe the school's relationship with the state are presented.

The state, acting under its police powers, may regulate private schools within the limits of the school's due process rights.[2] The due process clause, once widely used by courts to invalidate legislation,[3] retains some of its

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[1] This is the question of the proper balance between the individual's "right" to pursue an occupation, and the state's role in regulating individual's activities for some common good. For a broader discussion of the issues raised by state licensure see Reich, The New Property, 73 Yale L.J. 733 (1964). Critics of occupational licensure include the following. (cited in Wallace, Occupational Licensing, 14 WM. & MARY L. REV. 46, 48 n. 10): M. FRIEDMAN, CAPITALISM AND FREEDOM 137-60 (1962); W. GELHORN, INDIVIDUAL FREEDOM and GOVERNMENTAL RESTRAINTS 105-51 (1956); D. Lees, Economic Consequences of the Professions (1966); Doyle, The Fence-Me-In Laws, 205 Harpers 89 (1952); Graves, Professional and Occupational Restrictions, 13 TEMP. L.Q. 334 (1939)Hauft & Hamrick, Haphazard Regimentation Under Licensing Statutes, 17 N.C.L. REV. 1 (1938); Silverman, Bennett & Lechliter, Control by Licensing Over Entry into the Market, 8 LAW & CONTEMP. Probl. 234 (1941)).

[2] State v. Williams, 253 N.C. 337, 117 SE 2d 444 (1960); State v. Nuss, 114 N,W. 2d 633 (S.D. 1962); 66 Am Jur 2d Schools 309 (1965).

[3] Representative Supreme Court cases which utilize substantive due process concepts are: Cappage v. Kansas, 326 U.S. 1 (1914) Lochner v. New York, 198 U.S. 45 (1909).

The Supreme Court, and other federal courts, no longer invalidates legislation on the basis of substantive due process. See, *North Dakota State Board of Pharmacy v. Snyder's Drug Stores, Inc.*, 94 S. Ct. 407 (1973) (reversing state decision which relied on substantive due process to invalidate a state requirement that pharmacies not be operated by corporations, unless pharmacists controlled the corporations); *Lee Optical Co. v. Williamson*, 348 U.S. 483 (1955); *United States v. Caroline Products*, 304 U.S. 144 (1938). *Nebbia v. New York*, 291 U.S. 502 (1933) ("The Constitution does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases. Certain kinds of businesses may be prohibited; and the right to conduct a business, or to pursue a calling, may be prohibited.") (citations omitted)

former powers in the state courts, where regulatory schemes are still scrutinized for deficiences under the due process guarantees of the state constitutions.[4] The application of substantive due process to invalidate a statute depends on whether the statute regulates a business which is affected with a public interest (a "natural monopoly") and whether the statute is designed to protect the general welfare. Licensing requirements and regulations, imposed on occupations and businesses under the former rationale have been accorded varying treatment in the state courts. Regulation has generally been upheld where the public interest involved is found to be substantial,[5] and the burden imposed not undue.[6]

Relatively little authority exists concerning the permissible limits of schools regulation.[7] An early case made it clear that states cannot arbitrarily interfere with schools.[8] A statute prohibiting certain private schools from collecting more than $25 tuition in advance was found to fit this description.[9]

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[4] See Paulsen, The Persistence of Substantive Due Process in the States, 34 Minn. L. Rev. 91 (1950); Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 N.W. U.L. REV. 226,244-48 (1958) [hereinafter cited as HETHERINGTON]. Cases illustrating the application of the doctrine in the state courts are: Pennsylvania State Board of Pharmacy v. Pastor, 272 A.2d 487 (1971) (statute which prohibited advertising of drug prices unconstitutional); Estell v. City of Birmingham, 286 So 2d 866 (Ala. Ct. Crim. App. 1973) ("anti-scalping" statute unconstitutional); People v. Brown, 407 Ill. 565, 95 N.E. 2d 888 (1950) (licensing requirement for plumbers unconstitutional); Moore v. Sutton, 185 Va. 481, 39 S.E.2d 348 (1946) (licensing requirement for photographers unconstitutional). Although the state courts are bound by the Supreme Court's interpretation of the 14th Amendment, and therefore seemingly obliged to reject the substantive due process doctrine, the state courts have continued to apply substantive due process. This circumvention of current federal constitutional doctrine has been accomplished in some cases by reliance on due process provisions of state constitutions, and in other cases by inattention to more recent pronouncements of the Supreme Court.

[5] Hetherington at 229.

[6] Hetherington at 240, 234 n. 154.

[7] A good discussion of prior cases is found in State v. Williams, 253 N.C. 337, 117 S.E. 2d 444 (1960).

[8] Pierce v. Society of Sisters, 268 U.S. 510 (1924). This case established that schools have a constitutional right to due process.

[9] State v. Nuss, 114 N.W. 2d 633 (S.D. S. Ct. 1962).

New York's private trade school act was found unconstitutional insofar as it directed the Regents' to condition licenses on their approval of the tuition charged by these schools.[10] A state cannot regulate schools teaching a foreign language in an oppressive manner.[11] A statute which prohibited a lawful educational corporation from operating without the consent of the voters in the area was held unconstitutional.[12] On the other hand, the state may require schools to procure licenses to operate,[13] and regulate the granting of degrees[14] and the name used by a college.[15]

The principle which emerges from these cases is that "[t]he state has a limited right, under the police power, to regulate private schools and their agents and solicitors, provided: (1) there is a manifest present need which affects the health, morals or safety of the public generally, (2) the regulations are not arbitrary, discriminatory, oppressive or otherwise unreasonable..."[16]

Because of the importance of education to the public, and the difficulty of protecting consumers from unscrupulous practices, courts are unlikely to invalidate most regulatory schemes.

State regulatory schemes are more likely to encounter difficulties when their purpose is to limit the number of schools operating in a given area. An example of this sort of regulation is seen in New York, where permission to operate in the state is dependent on a showing of "need" for the proposed institution.[17] When the regulation imposed is this burdensome, the state must demonstrate that the business so regulated is affected with a "public interest." This is often traced to a now discredited Supreme Court decision, in which the Court invalidated a requirement that ice companies procure a certificate of necessity prior to operation[18] The Court held this form of regulation was unconstitutional because manufacturing ice was an "ordinary business", which was "essentially private" in nature, and not a "natural monopoly", or an "enterprise in its nature dependent upon the grant of public privileges".[19] The opinion also referred to a "[c]ommon right to engage in a lawful private business." Justice Brandeis' dissent indicated the direction the Court would take later. The present status of *Liebmann* and the "affected with a public interest" doctrine in the federal courts is treated in *Boylan v. United States*.[20]

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[10] *Grow System School v. Board of Regents*, 277 App. Div. 122, 98 NYS 2d 834 (S. Ct. 1950).

[11] *Farrington v. Tokushege*, 11 F2d 710 (9th Cir. 1926); see *Meyer v. Nebraska*, 262 U.S. 390 (1923).

[12] *Columbia Trust Co. v. Lincoln Institute of Kentucky*, 138 Ky. 804, 129 SW 113 (Ct. App. 1910).

[13] *People v. American Socialist Soc.*, 202 App. Div. 640, 195 NYS 801 (Sup. Ct. 1922) (upheld against First Amendment and due process challenge requirement that school not allow teaching or overthrow of government).

[14] *Shelton College v. State Board of Education*, 48 N.J. 501, 226 A.2d 612 (1967).

[15] *Institute of the Metropolis, Inc. v. University of the State of New York*, 274 N.Y. 504, 10 N.E. 2d 504 (1937).

[16] *State v. Williams*, 253 N.C. 337, 117 S.E. 2d 444, 450 (1960).

[17] §§3.56, 5.21 of Title VIII of the Official Compilation of Codes, Rules, and Regulations of the State of New York.

Many states have certificate of need requirements that apply to new hospital construction.[21] This article is an extensive examination of the efficacy of certificates of need as a device to regulate the growth of hospitals. The Supreme Court of North Carolina, which has a long history of searching legislation for violations of substantive due process[22] declared this requirement to be a violation of due process clause of the state's constitution because the court could find no benefits accruing to the public from the requirement. The court explained that although the state's right to regulate hospitals was undisputed when the "right to engage in a business" is withheld a strong sharing of public advantage must be made. A New York court considering a similar statute applied to nursing homes held the statute was constitutional.[23]

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[18] *New State Ice Co. v. Liebmann*, 285 U.S. 262, (1931).

[19] 285 U.S. at 277, 279.

[20] 310 F. 2d 493 (9th Cir. 1962).

[21] Havighurst, "Regulation of Health Facilities and Services by Certificate of Need", 59 *VA. L. Rev.* 1143, 1144 (1973).

[22] *See*, *State v. Ballance*, 229 N.C. 764, 51 S.E. 2d 731 (1949); *Roller v. Allen*, 245 N.C. 516, 96 S.E.2d 851 (1957).

[23] *Attoma v. State Department of Social Welfare*, 26 App. Div. 2d 12,270 NYS 2d 167 (1966).

A 1948 Pennsylvania case[24] concerned the state's attempt to regulate Hertz by requiring it to possess a certificate of public convenience and necessity before it could rent cars. The court held that the business of leasing cars was not sufficiently imbued with a public interest to be subject to this kind of regulation consistently with the due process guarantees of the state and federal constitutions. After observing that there was no certain test for when a business was affected with a public interest, the court concluded that the "capacity for monopolistic use in the performance of a service to the public in general" was a reliable indication that a business was affected with the public interest.[25] These cases demonstrate that only when an industry is found to possess the characteristics of a natural monopoly will state legislations restricting entry into the field be upheld.

The economic justification for state perpetuation of a monopoly is readily apparent when discussing telephone companies or other public utilities where inefficiency in use of resources will lead to detriment to the consumer. However, restricting the number of competitors in an industry that is not a natural monopoly[26] will work a sacrifice of the ordinary benefits of competition:

> "The belief that competition results in deterioration of a product is true only in the pure public utility case. In other situations competition tends to improve the "quality" of the product. More importantly, competition widens the range of types of goods that are available to buyers. If competition among liquor dealers lowers the price of existing liquor and brings into the market additional lower priced liquors, the consumer benefits since he has a wider range of choices."[27]

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[24] Hertz Drivyurself Stations v. Siggins, 359 Pa. 25, 58 A. 2d 464 (1948).

[25] 58 A. 2d at 471. Two other cases following Hertz have struck down certificate of need requirements applied to the renting of motor vehicles: Hertz Corp. v. Heltzel, 217 Ore. 205, 341 P. 2d 1063 (1959), and State ex rel Schrath v. Condry, 139 W. Va. 827, 83 S.E. 2d 470 (1954). One case which reached a contrary decision is, Corpus Christi v. Texas Driverless Co., 187 S.W. 2d 484 (Tex. Civ. App. 1945, modified on other grounds, 144 Tex 288, 190 S.W. 2d 484. A good discussion of constitutional limitations on certificate of need requirements is found in Visco v. State, 95 Ariz. 154, 388 P.2d 155 (1964).

[26] The nature of a "natural monopoly" is explained in this passage from Barron, Business and Professional Licensing-California, A Representative Example,' 18 STAN. L. REV, 640, 642 (1966): Conceptually, there are industries in

which the nature of the resources that are used in production is such that one producer can supply the entire market for the product at a lower real cost (use fewer resources) than can several producers. In this natural monopoly situation the existence of more than one producer will have one or both of two effects: (1) Each seller will have excess capacity, and such capacity, together with low or declining costs of using it, will lead to successive price reductions until the price of the product declines to the level of out-of-pocket costs. Eventually, only one seller will survive, and the consumer will be faced with a true monopoly. (2) While this "ruinous" competition continues, firms, in an effort to cut costs, may reduce the quality of the product to the detriment of the buyer.

Where this condition is thought to exist, the police power may be used to grant monopolistic production of the product by means of a public utility "license." The price and output of the public utility are regulated by the public in an effort to secure production of the product at nonmonopolistic prices.

[27] Id. at 658.

There are no reported cases concerning the constitutionality of a requirement of a certificate of need to operate a school. If the "natural monopoly" justification is a prerequisite to this form of regulation, then it seems unlikely that higher education can be so regulated. Although an overabundance of schools creates a drain on the state's educational resources, less drastic measures than limiting the entrance of new schools can be devised to prevent waste.

One commentator urged courts to consider whether legislatures might have used less extreme measures to accomplish their goals.[28]

In conclusion, most state regulation of higher education is within the bounds of even the most strict interpretation of the state's authority under the due process clause. However, state regulation which is so extreme as to actually prohibit the operation of a school for reasons unrelated to its educational quality may encounter difficulties in some state courts.

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[28] Struve, The Less-Restorative-Alternative Principle and Economic Due Process, 80 HARV. L. REV 1463 (1967).

4.4.2 Procedural Due Process

The most important safeguards provided under the rubric of "due process" are the panoply of procedural rights assured one who is harmed by state action. Without case law on the rights of school licensees one cannot determine exactly what procedures are required at each stage of administrative action, but the parameters of due process can be determined.

The basic rule governing due process is that the

> "extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss'.... Accordingly...'consideration of what procedures due process may require under any given set of circumstances must begin with a determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action'".[29]

A recent case, Blackwell College of Business v. Attorney General,[30] is illustrative of the due process requirements that schools have with reference to governmental licensing.

The college was approved by the Immigration and Naturalization Service (INS) for attendance by nonimmigrant alien students. INS, on the basis of an investigation it had undertaken, informed the school that its approval was to be withdrawn, and then gave it an opportunity to have an "interview" with an administrative officer. The administrative officer was the same person who had informed the school of the withdrawal of approval. Finally, no participation by counsel was afforded. The court characterized the proceedings as "formless and uncharted".[31]

The court's enumeration of procedures that must be followed in the future comprise a checklist for due process scrutiny. First, notice that it specifies in reasonable detail that grounds of dissatisfaction must be given.[32]

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[29] Richardson v. Perales, 402 U.S. 389, 401-02 (1970); quoting from Goldberg v. Kelly, 397 U.S. 254, 262-63 (1970).

[30] 454 F. 2d 928 (D.C. Cir. 1971).

[31] Id.

[32] The court also concluded that INS was subject to the Administrative Procedure Act, which requires that before an agency institutes proceedings, it give (1) notice and (2) "opportunity to demonstrate or achieve compliance with all lawful requirements," (5 U.S.C., para 558(c)). This procedure is not necessarily required of agencies not subject to the APA.

A hearing must be provided, before a different administrative officer than the one who did the initial investigation.

The nature of the charge against the school determines the school's right to confront and cross-examine witnesses. If the charge involves documentary records, then the school may contest the records with other records or live witnesses. If the charge is founded on hearsay (which is not admissable under an exception to the hearsay rule) then the school has a right of cross-examination and confrontation.

Counsel is permitted in all proceedings, and a record must be made.

Most cases involving the withdrawal of a license to operate, or other equally important state action, would seem to call for procedures at least as strict as these.[33]

The most serious due process deficiency of state licensing boards is the presence of members of the regulated industry on the decision-making board. The Supreme Court has said that "(a)n impartial decision maker is essential."[34] Thus, the issues of fairness implicit in an argument against delegation to private parties become paramount under due process. Gibson v. Berryhill[35] involved a conflict between independent optometrists (the Association) and optometrists who were employed by other persons. Alabama had established a state licensing board, which was restricted in membership to optometrists who belonged to the Association. Under these circumstances, the Court concluded that the Board should not adjudicate proceedings involving the non-Association members, because the Board members has a pecuniary interest in the outcome.[36]

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[33] In Blackwell, the court stated that Blackwell's "[a]pproval status was a valuable asset in the nature of a license...", but did not discuss the degree of harm visited on the aggrieved school. However, the court did state that the interest of the government was that approval be withdrawn only after due process was given, because of the government's interest in allowing students to enter. This reasoning would eliminate a need to balance the government's interest against that of the individual, because there is always a governmental policy that programs be fairly administered, and would lead to the conclusion that full due process should always be accorded.

[34] Goldberg v. Kelly, 397 U.S. 254, 271 (1969).

[35] 411 U.S. 564 (1973).

[36] But see, People v. Murphy (364 Mich. 364 Mich. 363, 110 N.W. 2d 805 (1961), where on similar facts the opposite decision was reached.

8.4.3 Delegation of Legislative Power

Legislative acts establishing a licensing scheme for schools may simply name a board and direct it to issue or withhold licenses. The act may note the problem perceived by the legislature, the general areas in which criteria must be met, and even specific requirements to be satisfied by applicants. The bodies to which authority is delegated may or may not adopt regulations and procedures for review of its decisions.

The question which arises when power to implement an Act is given to an administrative agency is whether there has been an unconstitutional delegation of legislative power. [37] It is traditionally believed that "the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority".[38] Courts have attempted to distinguish between administration of a law, and the "making" of a law.[39]

Two cases involving regulation of private schools illustrate the application of these principles. In *Packer Collegiate Institute v. University of State of New York* [40] a private school refused to register with the regents of New York, instead moving for a declaratory judgment that was unconstitutional. The statute requiring registration contained no standards circumscribing the Regents' authority, stating simply that schools must register "under regulations prescribed by the board of regents"[41]

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[37] The federal courts are no longer likely to find an unconstitutional delegation of power, but the doctrine persists in many state courts. See Davis, *Administrative Law Text* 2.06 (1972).

[38] Cooley, *Constitutional Limitations* 163 (7th ed. 1903). The Constitutional logic underlying this belief is that: Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust."

[39] The distinction made is "[b]etween the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution to be exercised under and in pursuance of the law."
Cincinnati, W.8 Z.R. v. Clinton, 1 Ohio St., 77,88 (1852), quoted with approval in Field v. Clark, 143 U.S. 649, 693-94(1892). See DAVIS, ADMINISTRATIVE LAW TEXT 2.06 (3rded.1972) for an excellent discussion of this issue.

[40] 298 N.Y. 184, 81 N.E. 2d 80 (1948).

[41] 81 N.E. 2d at 81.

The court struck the statute down as violative of the New York constitution,42/ stating that "[T]he legislature has not only failed to set out standards or tests by which the qualifications of the schools might be measured, but has not specified, even in most general terms, what the subject matter of the regulations is to be. . . .there must be a clearly delimited field of action and, also, standards for action therein."43/

In State v. Williams44/ the defendant was convicted under the penal section of an act which licensed solicitors for private schools, and the schools themselves. Here the statutory scheme stated the purpose of the legislation, and provided that the State Board of Education should examine the sales methods and instructional programs of the school. The court found the legislature's failure to specify the standards which should govern the Board's approval fatal to the constitutionality of the scheme. The court quoted from another case in which an agency had been given authority to suspend "habitual violators" with no standards to control its determination:

> "'...(w)hile the legislature may delegate the power to find facts or determine the existence or nonexistence of a factual situation or condition on which the operation of the law is made to depend..., it cannot vest in a subordinate agency the power to apply or withhold the application of the law in its absolute or unguided discretion...'"45/

Other cases have taken an opposite tack. Thus, a statute giving authority to an Alcoholic Beverage Control Commission to grant liquor licenses unless the Board found the location was not a "suitable one" was upheld. 46/ Similarily, a statute that gave fire departments authority to "make all needful rules and regulations with respect to the department and the management of the money to be paid to the treasurer"47/ survived a

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42 Article III, para 1 "The legislative power of this state shall be vested in the senate and and assembly."

43 81 N.E. 2d at 82.

44 253 N.C. 337, 117 S.E. 2d 444) (1960).

45 Harvell v. Scheidt, 249 N.C. 699, 107 S.E. 2d 549, 551 (1959), quoting from Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority, 237 N.C. 52, 74 S.E. 2d 310 (1953).

Accord, Revco Southeast Drug Centers, Inc. v. North Carolina Board of Pharmacy, 204 S.E. 2d 38 (Ct. App, N.C. 1974) where the court declared unconstitutional a statute giving a board of pharmacists authority to adopt a code of professional conduct "[a]ppropriate to the establishment and maintenance of a high standard of integrity and dignity in the practice of the profession" because no guidelines were provided.

See also 16 C.J.S. 138 and cases cited in Davis, Administrative Law Treatise, 1958, 2.11.

46 Terry v. Pratt, 187 S.E. 2d 884 (S.C. Sup. Ct. 1972).

47 People v. Mayor of City of [illegible]elleville, 174 N.E. 2d 678 (S Ct. Ill. 1961).

constitutional challenge. The court reiterated that the power to make laws cannot be delegated, but found that the legislature "may delegate to others those things which the legislature might properly do, but cannot do understandingly or advantageously." 48/

The vagaries of state law regarding delegation are perhaps best illustrated by two cases, 49/ one from New York, 50/ and the other from Florida. 51/ In both, a statute delegated power to a state board to issue certificates to "psychologists", providing penalties for the use of that title without possession of a certificate. The New York court rejected the assertion that the statute's failure to define "psychologist" rendered the delegation unconstitutional because there were no legislative standards prescribed to guide the board. The Florida statute was successfully challenged on the grounds, inter alia, that the portion of the statute requiring the Board to give an examination in "psychology" failed to define or delimit the field.

The typical opinion by a state court regarding delegation has been characterized by Kenneth Culp-Davis:

> "It says that (1)legislative power may not be delegated, (2) that 'filling up the details' is not an exercise of legislative power, (3) that legislative power is not delegated if the Legislature has laid down a standard to guide the exercise of the power, and (4) that presence or absence of vague verbalisms like "public interest" or "just and reasonable" make all the difference between valid legislation and unlawful delegation. 52/

Davis' thesis, which is apparently meeting with approval in some courts, is that attention to the standards accompanying a delegation of power is misplaced, and that courts should concern themselves rather with the administrative safeguards governing the exercise of power. In this respect problems of vague deligations may be better treated in terms of procedure due process.

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48 Id. at 681.

49 Both cases are discussed at Davis, Administrative Law Treatise, para. 2.11, 1970 Supplement.

50. Diemer v. Diemer, 8 N.Y. 2d 197, 168 N.E. 2d 649, 203 N.Y.S. 2d 821 (1960), appeal dismissed, 365 U.S. 298 (1961).

51 Husband v. Cassel, 130 So. 2d 69 (Fla. 1961).

52 DAVIS, Administrative Law Tex -39 (1972)

In conclusion, a school denied a license by an administrative board for arbitrary reasons, or no reason at all, might well meet with success in persuading a court to examine whether the legislature should have granted uncontrolled power to an administrative board. [53]

Another issue which emerges from examining state regulatory schemes is their reliance on private groups for their implementation and aid in regulation. One form this reliance takes in statutes regulating education is a provision that all out of state schools operating in the state be accredited by a private accrediting association. Other states merely exempt accredited schools from some, or all, of their licensing schemes. Schools operating in the state may be required to be as good as local schools. Finally, the very board entrusted with the operation of the statute may be composed of the presidents and owners of local schools.

All of these provisions in a regulatory scheme are arguably delegations of legislative authority to private groups. The law concerning delegations to private groups is unclear, but generally courts hold delegations of legislative authority to private parties unconstitutional, with the discrepancy in conclusions the result of disagreements over when a delegation has been made.[54]

The provision found in some state statutes that schools be of comparable quality to already established schools may be sufficiently comparable to a statutory provision that wages paid public employees be at "prevailing" rates as to be similarily unconstitutional. [55]

Many state regulatory schemes provide for the formation of a board composed of representatives of schools in the state to implement the act. [56] Here the nature of the board's authority is crucial, for where

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[53] Davis, despite his general opposition to reliance on the nondelegation doctrine, states: "In many state courts, cases still can be won by asserting the non-delegation doctrine, and perhaps this should be so to the extent that legislative bodies behave irresponsibly in delegating without providing either adequate standards or adequate safeguards". Id. at 51.

[54] Davis, Treatise, 2.14 See discussion of cases there, and in 1970 Supplement, 2.14.

[55] The cases are divided over the validity of prevailing wage provisions. See, Davis, Treatise, 2.14; Annot. 18 A.L.R. 3rd 944, 8; Schryrer v. Schirmer, 171 N.W. 2d 634 (S.D.S. Ct. 1969); Kugler v. Yocum, 71 Cal. Rptr. 687, 445 P. 2d 303 (1968).

56 It should be stressed that the composition of the board, the manner in which appointments are made, and other considerations relating to the public nature of the board would be critically important to an argument that an unlawful delegation had taken place. The argument can be made that any state board is a public administrative agency, regardless of the members occupations. See, Simon v. Cameron, 337 F. Supp. 1380 (D. Calif. 1970). This contention has been criticized by Jaffee, in his article, Law Making by Private Groups, 51 HARV. L. REV.201,232 (1937).

it is merely given an advisory function it is more difficult to argue that a delegation of power has occurred.

Where real regulatory power is given to an interested board of school representatives the Supreme Courts' statement in Carter v. Carter Coal Co., 57/ which concerned the constitutionality of an Act giving the power to set wages and prices to the majority of owners and miners, is still relevant:

> "The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. . . . [O]ne person may not be entrusted with the power to regulate the business of another, and especially of a competitor".

An extreme example of delegation to private groups is found in Allen v. California Board of Barber Examiners 58/ where the State Board of Barber Examiners, which consisted of four barbers and one public representative, was given the authority to fix minimum prices. The court held the statute was unconstitutional, because,

> "'When the power which the legislature purports to confer is the power to regulate the business of one's competitors. . . a real danger of abuse arises, and the courts accordingly insist upon stringent standards to contain and guide the exercise of the delegated power'". 59/

The reference to standards may indicate a trend towards judicial examination of the actual operations of a private regulatory group. 60/ Of course, price-fixing by barbers is generally considered worlds apart from the regulation of schools by educators. One can forsee circumstances, as when competition among schools for sparse monies is pronounce that courts might be reluctant to allow competitors to be entrusted with regulatory powers. Again, as discussed before, due process has been held to include a requirement of an unbiased decision maker, thereby achieving the same result.

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57 298 U.S. 238 (1936).

58 25 Cal. App. 3rd 1017, 102 Cal. Rptr. 368 (Ct. App. 1972).

59 Allen v. California Board of Barber Examiners, 25 Cal. App. 3rd at 1018, 102 Cal. Rptr, at 370, quoting from Wilke and Holzheiser, Inc. v. Dept. of Alcoholic Beverage Control, 65 Cal. 2d 349, 367, 55 Cal. Rptr. 23, 35, 420 P. 2d 735, 747. For another case similar to Allen see State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal. 2d 436 254 P. 2d 2d 29

60 In this case the court found the legislative direction to the Board "to consider all conditions affecting the industry, including costs, and the relation of these conditions to the public health, welfare and safety" (Allen at 25 Cal. App. 1020, 102 Cal. Rptr. 371) an inadequate standard. See Jaffee, Law Making by Private Groups, 51 Harv. L. Rev. 201 at 251 (1937) where he questions the efficacy of such standards, as a control upon private groups, because of the fundamental lack of public administrative control.

When a state only permits accredited schools to operate in the state, or subjects them to more favorable treatment than non-accredited schools one can question whether an unlawful delegation of authority has been made to the accrediting agencies.

Two cases dealing with this contention as applied to accreditation of schools will be discussed.

In Colorado Polytechnic College v. State Board for Community Colleges and Occupational Education 61/ the plaintiff college challenged a statute which prohibited educational institutions from granting degrees unless the majority of the credits earned at the institution were "generally acceptable or transferable to at least one college or university accredited by. . ."62/ one of the six regional accrediting agencies as an unlawful delegation of legislative powers. The court rejected this assertion stating: [W]e deem it entirely appropriate in the field of higher education to leave recognition of academic achievement to these institutions and associations which are uniquely qualified by professional training and experience to make such judgments. Necessity fixes a point beyond which it is unreasonable and impracticable to compel the legislature to prescribe detailed rules for the purpose of avoiding an unconstitutional delegation of authority. 63/

A similar constitutional challenge was raised to a state bar association rule that required graduation from law school approved by the American Bar Association as a prerequisite to graduation. 64/ The court discussed the practical necessity for general rules governing bar admissions because of the difficulty of evaluating all law schools, and found the rule valid because it was reasonable method of achieving the purposes of the bar association.65/

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61 476 P. 2d 38 (Col. Sup. Ct. 1970).

62 C.R.S. 124-21-2(5) (Perm. Supp. 1965)

63 476 P. 2d at 42.

64 Application of Schatz, 497 P. 2d 153 (S. Ct. Wash. 1972).

65 The court relied on *Rosenthal v. State Bar Examining Committee*, 165 A. 211 (S. Ct. Conn. 1933), which was a similar case, in reaching its decision. Other cases upholding this requirement are *Herrington v. State Board of Bar Examiners*, 60 N.M. 393, 291 P. 2d 1108 (1958) and *Hackin v. Lockwood*, 361 F. 2d 499 (9th Cir. 1966); *In re Stephenson*, 42 L.W. 2030, 6/25/73 Alaska S. Ct.

The courts in both these cases were concerned with the reasonableness of relying on accrediting associations, not whether the delegation was unlawful because of the lack of safeguards surrounding the state's reliance on these agencies. The dissent in the latter case argued that the state bar association neither adopted its own standards for acceptable law schools, nor enforced compliance with them 66/ thus effectuating "[a]n unconstitutional transfer of public sovereignty to a private organization." 67/ but this argument was not discussed in the majority's opinion. 68/

Judicial reluctance to invalidate reliance on accreditation can be explained as a relaxation of judicial scrutiny where the private action is undertaken for reasons independent of the statute. 69/ One can question this presupposition of disinterestness given the entaglement between accrediting associations and govermental actions, 70/ but at present there is no indication that courts will interfere, in non-delegation grounds, with state reliance on accrediting associations.

A limitation to the legislature's ability to empower accrediting agencies to screen applicants, is found in a principle of nondelegation which makes statutes which adopt future laws unconstitutional. A statute enacted in 1947, which prevented anyone not a graduate of an accredited medical school from being licensed, was declared unconstitutional because at the time the statute was passed there was no list of accredited foreign medical schools, and none were formulated for the next three years. 71/ The court stated,

> "Legislative power is nondelegable. When the legislature declares that schools on an existing list are accredited schools and those not on are not, it is legislating; but when it declares that accredited schools shall be those on a list thereafter to be promulgated, irrespective of the authority promulgating such list, it is attempting to delegate legislative power and such an act is unconstitutional."

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66 497 P. 2d at 161.

67 497, P. 2d at 157.

68 The reliance by these two courts on evidence of reasonableness suggests an equal protection analysis was utilized. In the field of hospital accreditation a statute requiring that abortions be performed in hospitals accredited by a private group was upheld as a constitutional delegation of governmental power because it was neither "[a]rbitrary, unreasonable, nor discriminatory". People v. Barksdale, 105 Cal. Rptr. 1, 503 P. 2d 257 (1972). The Supreme Court, in Doe v. Bolton, 410 U.S. 179 (1973), irvalidated a statute requiring accreditation of facilities where abortions were performed stating that", 'It is a requirement that simply is not 'based on differences that are reasonably related to the purposes of the Act in which it is found'". (Morey v. Dowd, 354 U.S. 457 (1957)).

69 Davis, Treatise 2.14. (1958)

70 See Jaffee, pp. 228-31.

71 State v. Urquhart, 310 P. 2d 261, 264 (Sup. Ct. Wash. 1957).

In another case that part of a state statute prohibiting "subversives" from holding public positions, which defined membership in a "subversive organization" to include membership in any organization placed on the United States Attorney General's list was held unconstitutional because, inter alia, it adopted future federal rules. 72/

The relevance of this principle to a statute which exempts accredited schools is that new schools are constantly being added, so that under this principle a statute purporting to embrace new lists would be void. 73/

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72 Norstrand v. Balmer, 335 P. 2d 10 (Wash. Sup. Ct. 1959).

73 Courts will, where possible, interpret statutes as only incorporating the list, or standard, in effect at the time the statute was enacted, thus choosing to interpret the statute as constitutional. Seale v. McKennon, 336 P. 2d 340 (Ore. Sup. Ct. 1959). People v. DeSilva, 32 Mich. App. 707, 189 N.W. 2d 362 (Ct. App. 1971).

4.5 Model Statute: Educational Commission on the States

4.5.1 The Education Commission of the States

In response to requests from the U.S. Office of Education, the Veteran's Administration, accrediting agencies, and state officials concerned about fraudulent and unethical practices in postsecondary education, the Education Commission of the States, in 1973, convened a Task Force to develop model state legislation in the field of postsecondary education. A copy of the model legislation which resulted from their effort appears in Appendix C.

The legislation, if adopted by each state, would plug many loopholes in the postsecondary legislation field. It would significantly increase the degree of uniformity and consistency among the states in the area of postsecondary education.

The model legislation would significantly alter the regulatory patterns of existing legislation. First, the legislation is broad in scope and includes all operations and programs available to persons of post high school age through all kinds of postsecondary institutions, both degree granting and non-degree granting. The legislation includes both in-state institutions and out of state institutions. The legislation also covers both institutions and their agents who solicit students.

Second, the legislation recommends that it be administered by some state administrative agency, either an existing state education agency or a newly established Commission on Postsecondary Education which would have full regulatory powers, including the power to investigate, the power to establish minimum standards, and the power of subpoena.

Third, the legislation establishes a basic licensing scheme. A resident institution cannot operate within the state without authorization to do so, nor may an agent without a permit operate within the state, whether representing an out-of-state or resident institution.

Fourth, there are several important features of the bill which support the rights of consumers. The standards section, Section 6 includes prohibitions against false, deceptive, misleading, or unfair advertising; disclosure of relevant information; requires that the institution has a fair and equitable cancellation and refund policy; and requires that permanent academic records be deposited with the state if the academic institution ceases to operate.

Another important consumer protection is contained in parts (3), (4), and (5) which would prevent use of the "holder in due course" doctrine, under which an institution might use a third party to collect payments from a student for services not yet provided, and which may never be provided. The provisions of the Act would permit the student to assert any defenses he might have in a suit to collect the institution's charges.

Section 21 makes postsecondary institutions wherever located, subject to the jurisdiction of the courts of states enacting the legislation, if such institutions provided or solicited to provide education to residents of the enacting state. This section makes it possible for a state to bring suit in his own state, and empowers the agency to obtain an injunction against fraudulent or deceptive practices of the institutions, thus curing many of procedural defects which now exist.

Finally, Section 13, Complaint of Violations, provides an easy method for redress of complaints by any person without immediate resort to the courts. Complaints or claims of damage will be responded to by the agency itself which has the power to hold administrative hearings, issue a cease and desist order from a prohibited practice, award full or partial restitution for damage and loss, and impose the penalties of the act.

In addition, the agency may require the postsecondary institution to post a surety bond which can be used to provide indemnification to any student, enrollee, or his or her parents, determined to have suffered loss or damage as a result of any act or practice which is a violation of the Act by an institution's agent.

One of the most important provisions, Section 18(1), makes unenforceable most judgments obtained for tuition and other charges obtained by out-of-state institutions in their own states, against students who are residents of the regulating state. In such circumstances the student would often have been unable to defend the suit adequately.

Unfortunately, the proposed legislation is deficient in one major respect: it authorizes the state agency to apply educational standards as well as administrative standards, and also provides the option of delegation to a private accreditation association the alternative of application of administrative standards.

Both administrative and educational standards appear in Section 6. These minimum standards are reasonable and are designed to protect the student consumer with adequate, fair, and accurate information so that he can make informed decisions on different institutions. Standards (i), (ii), and (iii), are the only educational standards that move purely beyond consumer interest and require the agency to make a substantive judgment on the educational quality of the academic program. Standard (i) requires the institution to demonstrate that the quality and content of each course of instruction is designed to achieve the objective for which the course or program is offered. Standard (ii) required that the institution has adequate space, equipment, instructional materials, and personnel to provide education of good quality. Standard (iii) requires that the education and experience qualifications of directors, administrators, supervisors, and instructors are such as may reasonably insure that the students will receive education consistent with the objective of the course or program study.

These statutory standards would normally be translated into detailed regulations. Administrative regulations developed by state educational agencies have often been framed in terms of structural criteria, e.g. How many tenured full-time faculty? How many Ph.D.'s on the payroll? Number of square feet per classroom? Percentage of budget spent on library books?

While non-functional criteria may be useful in making inferences that traditional academic programs are effective, they are less relevant to the external degree programs.

Traditional methods of assessing education are often of little help in determining the standards to use in assessing non-traditional programs. As Morris Keeton, provost of Antioch College has pointed out, among people who examine colleges for accreditation it is common that a good college will spend 4.5 to 5 percent of its educational budget on the library. Although examiners may apply their best judgment to the use of this standard, it is poorly correlated with how students use the best intellectual resources for their particular learning needs.1/

Although the Model Act states that:2/

> "The criteria to be developed hereunder shall be such as will effectuate the purposes of this Act, but will not unreasonably hinder legitimate educational innovation".

There will be a tendency for each state to develop its own educational standards resulting in fifty different ideas of what constitutes "quality education."

As external degree programs proliferate across state lines becoming national and regional in scope, different state educational standards could prove to be a severe constraint and a nuisance.

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[1] Keeton, M., A Statement to the Board of Regents of the State of New York regarding The Petition of Antioch College for Provisional Charter 12, (1974).

[2] Section 5(2)(a).

On the other hand, the states are accustomed to applying adminstrative standards in the area of fraud, misrepresentation, deceptive advertising, and protection of consumer interests. The states are able to recruit administrative personnel to undertake these tasks from within state government without great difficulty and the states have considerably more expertise in protecting the rights of consumers than do the private, voluntary accreditation associations which have neither the orientation, the financial resources, nor the personnel.

We, therefore, would recommend that the administrative standards be retained but that the educational standards (i), (ii), and (iii) be dropped. Except where the educational quality of the operating program is so deficient that fraud is the issue, we believe that states should refrain from making judgments on whether the education offered is of good quality.

It follows that we do not think that reliance on the accreditation associations for administrative judgments is appropriate. Part (2) of the statute permits the agency or commission to accept accreditation of an institution by an accrediting agency approved by the U.S. Commissioner of Education as evidence that it has complied with the minimum standards. The comments to the legislation are clear that it does not intend for the agency to abrogate its responsibility through substitution of accreditation for independent action. Nevertheless, we believe that a large number of states, will opt for reliance on the approval of private accreditation associations in lieu of making independent determinations in the administrative area. The record of private accreditation associations in protecting the rights of consumers, as discussed below, has been a sad one. Reliance on the accreditation associations would nullify the effectiveness of the legislation in protecting student rights. Such reliance raises the issues of delegation of authority by a governmental regulating body, whether federal or state, and the appropriate role for private accreditation in regulating the quality of postsecondary education. A detailed review of what the role of the accreditation associations has been in regulating the quality of postsecondary education is now in order.

5.0 THE ROLE OF THE PRIVATE ACCREDITATION ASSOCIATIONS.

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5.0 THE ROLE OF THE PRIVATE ACCREDITATION ASSOCIATIONS

5.1 Significance and History of Accreditation

5.1.1 Regional and Specialized Accreditation

The process of accreditation of institutions of higher education first emerged in the late 1800's in response to the need for common standards among colleges and universities. The first voluntary accrediting agency to come into existence was the New England Association in 1885. By 1900 the North Central, Southern, and Middle States Associations had been established. By the early 1900's the Northwestern and Western Associations had come into existence, thus extending the concept of accreditation throughout the country.

In general there are two types of accreditation: institutional or general, and specialized or program. Institutional accreditation is awarded by the six regional accrediting associations, each serving a specific geographical region of the United States. Regional or institutional, accreditation applies to the total institution and signifies that the institution as a whole is achieving its objectives satisfactorily.

Specialized or program accreditation is conferred by a number of organizations which are national in scope, rather than regional, and each of which represent a specialized area, such as architecture, practical nursing, law and teaching. A primary purpose of specialized accreditation is to maintain the standards within the profession that the accreditation association represents. Specialized accreditation developed as the result of a desire of professional groups to regulate the educational preparation for their professions. Usually an institution of higher education will possess both institutional and specialized accreditation.

Institutional and specialized accreditation parallel and compliment each other. Specialized accrediting agencies are concerned with specific educational areas. Institutional accrediting, conducted primarily by the six regionals, is quite different.

Three general principles underly the philosophy of the regional accreditation associations:[1]

(1) No distinctions are made regarding levels of quality. An institution is either worthy of being included in the membership of an association or not qualified for membership;

(2) Evaluation of the institution is in terms of the institution as a whole; the actions of the regionals apply to the institution as an entity rather than to any particular program or unit; and,

(3) While stating that an institution would be accredited in the light of its own statement of purposes, each regional association requires all academic institutions applying for or holding membership to have as a basic component of the curriculum a substantial program of general or liberal education.

Thus, each regional association will accredit an institution in spite of the fact that a college might be strong in some areas and weak in others. If the institution as a whole was considered to be of minimal quality, it would be accredited.

Structurally, accreditation associations are independent, non-profit organizations created by the institutions to regulate themselves. Generally, an institution seeks accreditation by agreeing to submit itself to an evaluation both from within and by its peers. The procedures of the accrediting commissions and associations usually involve five basic steps:

-- Establishment of educational standards in collaboration with educational institutions and other appropriate constituencies;

-- Conduct of institutional or program self-study by applicants for accreditation under the guidance of the accrediting body;

-- On-site evaluation by a team of peers, selected by the accrediting body, in order to determine first-hand if the institution's objectives and the accrediting body's standards are being met;

-- Publication of the accredited status of those institutions or programs which are determined by the accrediting body to have met its standards;

-- Periodic reevaluation of accredited institutions or programs to determine whether or not they continue to meet the established standards.

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[1] Puffer, C.E., Director, A Study Prepared for the Federation of Regional Accrediting Commissions of Higher Education. (1920) 25.

Within each regional association exists a Commission of Higher Education which conducts the work of accreditation. Membership follows accreditation by the Commission on Higher Education. The associations hold annual meetings where each member institution has one vote which is cast by its official delegate to the meeting. Approval of the Commission's recommendation is almost always automatic. Each commission has the authority to fix and collect fees as authorized by the board of trustees and to appoint an executive secretary and other professional staff members. A typical association commission would consist of approximately seventeen to twenty individuals elected with consideration given to geographical and institutional distribution in addition to the president of the association.[2]

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[2] *See Generally*, *Supra*, Puffer, C., 1-134, (1970) for a detailed description of the structure of each regional accreditation association.

5.1.2 The National Commission on Accreditation and The Federation of Regional Accrediting Commissions of Higher Education

The National Commission on Accrediting was established in 1948 to bring together for discussion and decision the various individual accrediting agencies with the end in view of reducing the number of organizations and developing more uniformity in accrediting procedure.[3] Its primary objective is to "accredit" accrediting agencies. At present, six regional[4] and approximately thirty-four,[5] professional accrediting agencies have met the National Commission's criteria for acceptance.

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[3] Kaplin, W., and Hunter, P.J., Comment, "The Legal States of The Educational Accrediting Agency: Problems in Judicial Supervision and Government Regulation," 52 Cornell L.J. 104, 105 (1966).

[4] Middle States Association of Colleges and Secondary Schools, New England Association of Schools and Colleges, North Central Association of Colleges and Secondary Schools, Northwest Association of Secondary and Higher Schools, Southern Association of Colleges and Schools, and Western Association of Schools and Colleges.

[5] National Association of Schools of Art, National Architectural Accrediting Board, American Association of Collegiate Schools of Business, American Chemical Society, American Public Health Association, American Dental Association, Engineers' Council for Professional Development, Society of American Foresters, American Home Economics Association, Accrediting Commission on Graduate Education, American Council on Education for Journalism, American Society of Landscape Architects, American Bar Association, Association of American Law Schools, American Library Association, American Medical Record Association, Board of Schools of Medical Technology, American Medical Association, Association of American Medical Colleges, National Association of Schools of Music, National League For Nursing, American Occupational Therapy Association, American Optometric Association, American Osteopathic Association, American Council on Pharmaceutical Education, American Physical Therapy Association, American Podiatry Association, American Psychological Association, Council on Social Work Education, American Speech and Hearing Association, National Council for Accreditation of Teacher Education, American Association of Theological Schools in the United States and Canada, American Veterinary Medical Association, and Engineers' Council for Professional Development.

Source: National Commission on Accrediting, Report (1972).

NCA will recognize only one organization to accredit institutions in a defined geographical area of jurisdiction and one organization to accredit programs of study in any one field of professional specialization. The criteria for eligibility for recognition by NCA parallel the Office of Education's criteria for recognition of accrediting agencies, except that the first criteria requires the agency, except in special circumstances, to be controlled by the institutions it regulates.[6]

Recognition by NCA is critical to any association in the accreditation business since academic institutions generally will only cooperate with associations recognized by NCA.

FRACHE

The Federal of Regional Accrediting Commission of Higher Education was created as a coordinating mechanism for the six regionals. A major purpose of the Federation is to develop uniform policies and standards which apply to all six regional associations.

The Articles of Agreement adopted April, 1968, and amended October, 1968, as follows:

> "As the agent of the constituent commissions, the Federation codifies and develops general principles and procedures for institutional evaluation and accreditation and generally for strengthening and increasing the effectiveness of higher education in appropriate ways. The Federation promotes the exchange of information, experience, and personnel among the constituent commissions, and provides means of communication and cooperation among them. It may establish committees and undertake projects in the common interest, make studies and seek funds to support them, relate itself to other agencies in the interest of the commissions and their member institutions, and speak for the constituent commissions on matters of general agreement."

In essence this is an agreement for representatives of six regions to meet and talk.

The power and authority for Federation activity is granted by the constituent members who are the commissions on institutions of higher education in the six regions. Article III withholds from the Federation powers which an outsider might assume it to have by stating that, "Each constituent commission retains responsibility for the evaluation and accrediting of particular institutions within its own area and for consultation and other related services, unless two or more commissions agree to work together. The Federation's general aim is to establish a national consensus for regional application.[7]

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[6] National Commission on Accrediting, "Procedures of Accrediting Education in the Professions," page 4.

[illegible] supra, at 165.

Last year, after several years of discussion and debate, a decision was made, scheduled for implementation on January 1, 1975, to merge the National Commission on Accrediting and FRACHE into a single organization called the National Council on Postsecondary Accreditation. This new structure will have the primary responsibility for coordinating and monitoring the accreditation of postsecondary education in the United States.[8]

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[7] Puffer Report, supra, at 265.

[8] By-laws of the National Council on Postsecondary Accreditation.

5.1.3 Significance of Accreditation

Accreditation is used for many purposes.

The Accreditation and Institutional Eligibility Unit of the United States Office of Education identifies nine functions of voluntary accreditation:[9]

1. Certifying that an institution has established standards;
2. Assisting prospective students in identifying acceptable institutions;
3. Assisting institutions in determining the acceptability of transfer credit;
4. Helping to identify institutions and programs for the investment of public and private funds;
5. Protecting an institution against harmful internal and external pressures;
6. Creating goals for self-improvement of weaker programs and stimulating a general raising of standards among educational institutions;
7. Involving the faculty and staff comprehensively in institutionally evaluation and planning;
8. Establishing a criterion for professional certification, licensure, and for upgrading courses offering such preparation; and
9. Providing one basis for determining eligibility for Federal assistance.

The status of accreditation has achieved enormous significance in recent years. Faculty members of unaccredited institutions are excluded from membership in professional associations such as the American Association of University Professors. Unaccredited institutions are not listed in standard reference works or compilations of information on universities and colleges. Students have great difficulty in transferring credits to accredited institutions. State licensing students[10] and licensing board regulations[11] after stipulate that a person applying for a license to practice a profession in the state must have pursued a program of study approved by that profession's accrediting agency.

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[9] Office of Education, *Nationally Recognized Accrediting Agencies and Associations-Criteria and Procedures*, 1, 1970.

[10] *E.g.*, Kan-Stat. Ann. §65-1631 (1964) (pharmacy); W.Va. Code Ann. §2869(b) (1961) (medicine).

[11] See, *Jones v. State Board of Medical Registration*, 111 Kan. 813, 208 Pac. 639 (1922).

State reliance on accreditation agencies to determine educational standards is significant, either because many states accept the accreditation of a private agency, in lieu of their own evaluation, or if they make their own evaluation they use criteria established by the private agency.

More important than any of those, eligibility for a variety of federal and state government financial aids depend on accreditation. Beginning with the Veteran's Readjustment Assistance Act of 1952, and reaffirmed in subsequent acts of the Federal Government, for an institution or program to be eligible to participate in federal funding, it must be accredited by some nationally recognized agency established for the purpose. The Commissioner of Education is directed to maintain a public list of such agencies and associations "which determines to be reliable authority as to the quality of the training offered by an educational institution."[12]

Because of this public reliance accreditation has in fact become akin to a monopoly power. The accrediting agency, as one of the project investigator's has pointed out in a prior article, "is not a truly 'voluntary' association, since, accreditation is a virtual necessity for the successful operation of a school. Neither is it a truly 'private' association, for it fulfills a public function and may more be classed as a quasi-public agency."[13] Because it is believed by many that so-called private accreditation associations are really quasi-governmental in character, their activities are being carefully scrutinized. An analysis of how the accreditation associations could ultimately thwart the development of external degree programs follows in the next section.

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[12] Higher Education Act of 1965, §1201(a)(5), 20 U.S.C. §1141 (a)(5).

[13] Kaplin and Hunter at 114.

5.2 Accreditation Obstacles to the Development of External Degree Programs

5.2.1 In General

Accreditation has been the subject of severe criticism in recent years. Accreditation supporters claim that accreditation is an effective process for stimulating institution's to improve themselves and for maintaining academic standards in higher education. Critics point out that accreditation no longer has any meaning because almost every legitimate institution of higher education is accredited, therefore reducing standards to the minimum. A very great debate is now being waged between those who desire to reform accreditation 14/ and those who would are primarily interested in replacing the existing system of voluntary accreditation with a system of state or federal accreditation. 15/

The advent of the external degree and other forms of non-traditional, raises to the forefront the underlying dilemmas in the present system of accreditation. Resolving these dilemmas is beyond the scope of this study, but discussion of the issue is unavoidable in designing an effective regulating mechanism for external degrees.

In this section we identify some of the problems that the present accreditation system poses for the external degree movement and assess the response of the accreditation associations towards it. The section that follows the next one is an assessment of the possibility of reforming the accreditation associations through the use of the judicial process, from the point of view of an "aggrieved" institution.

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14 See generally, Dickey, F.G., and Miller, J.W., A Current Perspective on Accreditation, Chapter 8, (1972).

15 For a Contrary View, See, Koerner, J.D. "Preserving the States Quo.- Academia's Hidden Cartil," 3 Change 52 (1971).

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5.2.2 Nationwide vs. Regional Standards

The first potential problem stems from the organization of the accreditation associations. Organized into six different regional associations there is the possibility that different students will be applied to external degree programs in different areas of the country. This would work a special hardship on programs that are becoming nation-wide networks and which operate in every region of the country. On the other hand, significant steps are now being taken by the accreditation associations themselves to ensure common policies and practices. The emergence of first FRACHE, and now the new Council on Postsecondary Accreditation, and the FRACHE joint policy statement on new-traditional study is concrete evidence that the associations are moving towards a national system of accreditation. Nevertheless, the nation-wide external degree program presents unique problems. Consider the problem of evaluating a nation-wide program operating at 20-30 locations, with 6-9 states, spanning two or more regional associations. Should each regional association undertake an independent evaluation of the programs operating in its region or rely on the judgment of the accreditation association with primary jurisdiction over the academic institution? Who should participate on accreditation visitation teams? National "experts" on non-traditional study, individuals selected from the region where the program is located, or individuals from the region where the institution is located, or all three? When policies and practices are different what should a regional association do? Expel the foreign institution? What kind of appeal mechanisms exist for foreign academic institutes which find foreign accreditation association rules and practices less liberal than its own accreditation association. How can the public know which accreditation association judgments are reliable? Finally, what happens when an accreditation association evicts a foreign academic institution soley to protect its constituent member institutions from competition. Those are the issues that are raised by the present balkanized state of accreditation.

5.2.3 Program vs. Institutional

Another problem is the policy of the regionals to accredit "institutions" rather than individual "programs". As a general matter this might make sense for traditional higher education, since its accreditation would become hopelessly complicated if they sought to evaluate each academic department, On the other hand, the off-campus external degree program may be the only one that the student has with the institute and should not be viewed as a single program but as a representation of the institution itself. Instead, it is now possible for accreditated institutions to initiate external degree programs which will escape the scrutiny of any evaluation process because they represent a relatively small portion of the institutions. As JB Lou Hefferlin points out in his advice to those who want to start a non-traditional program,[16] if you want to avoid regional intervention organize your program within a large and already accredited institution; as long as the program is small in proportion to other institutional offerings it is likely to be ignored. A typical accreditation statement that, for example, regional accreditation "applies to the entire institution" and "it indicates that each constituent unit is achieving its own particular aims satisfactorily, although not necessarily all on the same level of quality" does not provide anything of substantive value to the consumer. This brings us to another underlying dilemma which is the orientation of the accreditation associations to the consumer and the public interest.

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[16] Hefferlin, JB., "Avoiding Cut-Rate Credits and Discount Degrees", in Planning Non-Traditional Study Programs 171 (1974).

5.2.4 Not Oriented Towards Service To the Consumer

The primary purpose of accreditation is something called "institutional self-improvement". Institutions, not students, are the clients of the accreditation associations. As a result the associations are not geared up to police their institutions, or to monitor or enforce obedience to any single standard. They only make a collective judgment, a kind of stamp of approval, about an institution. Not only do they not have any capability to respond to the complaints of consumers in such areas as finance and administration, they are not even oriented toward the consumer. Accreditation reports are kept secret and the names of unaccredited schools are rarely published. The recent massive Brookings Institution study, directed by Harold Orlans, on private accreditation and private elegibility concluded that: 17/

> "Accreditation is a reliable indicator neither of institutional integrity viability. . . . Accrediting agencies are one of the thinnest needs for a student to learn upon. It would be useful to set up a control unit, perhaps in the new Consumer Protection Agency. . . .and assign it primary responsibility to serve student interests and coofdinate the related efforts of other agencies."

The Newman Report arrived at a similar conclusion. It states: 18/

> "In the name of protecting the standards of education, regional and specialized accrediting organizations pressure new institutions to develop faculties, buildings, and educational requirements on the pattern of established conventional colleges and universities. Moreover, these organizations- dominated by the guilds of each discipline- determine the eligibility of these new institutions for public support.
>
> We believe (1) the composition of established accrediting organizations should be changed to include representatives of the public interest; and (2) Federal and State governments should reduce their reliance on these established organizations for determining eligibility for Federal support".

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17 Brookings Institution, Private Accreditation and Public Elegibility, Draft Report, 548, 551 (1974).

18 Newman, F.R., Chairman. Report on Higher Education, 66 (1970).

The Newman Task Force has also circulated widely a November 24, 1971 draft of its second Report which states that accrediting agencies are functioning in a quasi-government role, and that their activities relate closely to the public interest. Because of the failure of the accreditation associations to protect the interests of the consumer, the Report calls for the establishment of an SEC-type federal agency to publish a prospectus type document which fully and fairly discloses all material facts about an academic institution.

Another report, prepared by an independent study commission in the private sphere, urges specialized accreditation agencies in the health field to justify their practices for the benefit of the consumer and the larger public interest.[19]

The accreditation associations can do much more to inform the public about the performance of academic institutions. As the Puffer Report indicates.[20]

"In every commission office there rest quietly and comfortably with almost no disturbance literally hundreds of self-studies, evaluation team reports, details of commission decision, etc., etc... The documents are packed with qualitative and quantitive information - a verifiable gold mine of pertinent material--and they are all confidential and unavailable to new or old institutions, or the public."

The publications would not only be helpful to new institutions, but would go far in demonstrating to the public that the regional commissions do insist upon good quality in accredited institutions.

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[19] See Generally, Commission Report, Study of Accreditation of Selected Health Educational Programs, (Nat'l. Comm'n. on Accrediting, 1972). This Study, generally called SASHEP, also published a very useful set of working papers on major issues in accreditation. See SASHEP, Staff Working Papers, Pt. I (1971); SASHEP, Staff Working Papers, Pt.II (1972).

[20] Puffer, Supra at 181.

5.2.5 Maintenance of the Status Quo

There has been much recent criticism of accreditation associations because it is claimed that they inhibit innovation and change. Much of the criticism has been based upon prejudiced and limited information. In fact it has been reported that college and university administrators less often view accreditation as a major problem in the development of non-traditional programs than such other factors in the lack of funds, the difficulty of assessing non-classroom learning, and the resistence of faculty.[21] As we discuss below, the accreditation staffs, both at the regional level and at FRACHE, are out in front of their own constituent members and have taken significant steps to faster innovation and non-traditional study. Up to the present, innovations in non-traditional study have taken place within traditional institutions of higher education, and we believe that this accounts for the reluctance of the regionals to intervene. Indeed, it is our conclusion that the regionals are doing too little, rather than too much, regulation of external degree programs, and there is a regulatory void that needs to be filled by some organized body.

On the other hand, we predict that as totally new institutions seek to emerge radical in form and content, the accreditation associations pressed by their constituent members to protect the established market in education will reassert themselves. As private academic institutions, in particular, fight for their survival, all of the system's power will be mobilized to prevent new competition from new, as distinguished from existing, institutions.

The Commissions, on the other hand, state that they are not opposed to innovation and they refer to the fact that each institution is to be evaluated in terms of its stated objectives which may vary widely. Nevertheless, the controversy over admitting proprietary institutions into membership in the regionals is a good case example of how the regionals restrict competition and new types of organizations from entering into the field.

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[21] See Generally, Ruyle, J., and Geiselman, L.A., "Non-Traditional Opportunities and Programs," in Planning Non-Traditional Programs 53 (1974).

5.2.6 The Bar Against Proprietary Institutions

The regional associations have had a long standing practice of excluding from their membership proprietary institutions. Their exclusion of proprietary schools rests upon the premise that "the profit motive is at odds with the education process in that the proprietary institution does not devote its total resources to education..."[22] Section 5.4 discusses the Marjorie Webster decisions and assesses the probability of reforming the accreditation associations through the use of the judicial process. This section focuses on how the bar against proprietary institutions prevents genuine reform and change in higher education.

Almost all proprietary education is vocational or technical in nature, rarely extending beyond the second year of college. Proprietary education has been recently tarnished by the activities of operators who have used fraudulent deceptive practices to lure students into inadequate and substandard programs. The abuses of the vocationally - oriented proprietary school chains have often been cased as a rationale by the academic community to perpetuate the exclusionary policies of the regional accreditation association. But proprietary education does not have to be synonymous with vocational education. The profit - making form of organization can be the basis for designing new educational ventures which are more effective than our existing universities and colleges. Consider some of the advantages and possibilities.[23]

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[22] 302 F. Supp. at 475. As this report was in the final stage of completion, the recommendations of the Committee on Proprietary Institutions of the Middle States Association of Colleges and Secondary Schools (See Appendix I) were approved by a vote of the entire membership at the December, 1974 annual meeting. The Committee Report recommended a Revised Article III, Section 2 of the by-laws:

Section 2: Institutional Membership

Any institution of higher or secondary education accredited by the appropriate commission, or any unit of such institution classified as operationally separate and accredited by the appropriate commission will be received into active membership dues, provided such institution meets the following minimum standards:

a) The institution has a charter and/or formal authority from the appropriate governmental agency to award, in the case of institutions of higher education, and in the case of institutions of secondary education, a diploma representing satisfactory completion of secondary education.

b) The institution has a governing board which includes a membership broadly representative of the public interest.

c) The institution devotes all, or substantially all, of its gross income to the pursuit of its educational purposes and programs.

Although this seems like a radical change in long-standing policy minimum standard (c) renders the policy change one of form rather than substance. An organization which is required to spend all of its gross income for educational programs prevents the accumulation of retained earnings and renders the notion of profit meaningless.

[23] See generally, Elliot, L., "Education - At a Profit?" Educ. Rec., Fall, 1969., 1.

--To really establish an effective technological-based university, like the British Open University, will require a massive infusion of capital, of a magnitude similar to the funding of the Public Broadcasting System. We would estimate that a minimum of $40 - 60 million would be needed to establish a network of regional open universities. The federal and state governments are unlikely to make such a massive commitment. Private universities are going bankrupt and individual donors and foundation money is drying up. Private capital is one solution to the financing problem. The present organization of higher education prevents universities and colleges from tapping into the nation's private capital markets, denying them the opportunity to secure equity funds for the development of new, cost-effective, academic programs, as a result traditional higher education remains a cottage industry.

-- Organized as non-profits, universities do not behave as institutions, in the same way as firms behave in competitive markets. Economic competition, characterized by notions of consumer demand, competitive pricing, and efficiency in dealing with costs, normally fails to obtain.[24]

-- A policy to require regional accreditation associations to evaluate proprietaryinstitutions that offer comparable college level programs would encourage the development of standards that measured a college's performance, rather than those which preserve the status quo. Educational excellence should be determined not by the form of organization, but by the quality of the program.

-- New institutional forms could emerge if the regionals relaxed their rules. Consider the possibility of colleges organized the way medical clinics are now, described by the Newman Report as "Learning Clinics." Each might be owned and operated by a small group of "faculty" members, licensed as professionals.[25]

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[24] Manne, H.G., "Scholars vs. Profits," Barron's, (August 25, 1969)

[25] Newman, F., Supra at 90.

5.2.7 Obsolete Evaluation Methodology

The evaluation methodology presently employed by the accreditation associations knows little from the methods of the behavioral or social sciences. In general the process consists of four steps: (1) the association establishes minimum standards which each institution must meet in order to receive accreditation; (2. [illegible]eam of experts makes an on-site visit to observe and interview; (3) the institution itself is required to make a self-study, which is presented to a review committee; and (4) accreditation is granted or denied, each decision being applaudable to a higher internal body. A major plan in the evaluation process is the standards themselves. These standards are generally arrived at through deliberation of experts on public education. The judgement of merit of a institutions's program is arrived at directly by experts on site-visits; such judgement is not usually mediated through objective tests of student and staff performances, representative surveys of attitude and opinion, data analysis, etc. The genetic defect in the evaluation methodology of accreditation is that its practitioners do not seek to justify empirically the standards used to judge value. Requirements are arrived at through expert judgement that is seldom holstered by evidence from empirical research. Indeed there is a mounting body of evidence which indicates that traditional measures of institutional quality are in fact irrelevant to student achievement.[26/]

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[26] Alexander Astin tries to determine the effects of certain traditional indices of institutional excellence on the intellectual achievement of the undergraduate student by using scores on the area tests of the Graduate Record Examination (GRE). His sample deals with students at colleges that require all seniors to take the area test; therefore, student self-selection, which occurs in the GRE national program for graduate school selection, is not a factor. Astin controls for initial ability of the students by using their scores on the National Merit Scholarship Qualifying Test (taken before entering college) as an independent variable. A wide array of other student input control measures are also used. Astin's analysis fails to confirm the hypothesis that the students' achievement in social sciences, humanities, or natural sciences is facilitated by the intellectual level of his classmates, the level of academic competitiveness or the financial resources of his institution. Astin also finds that differences in student achievement during the senior year are much more highly dependent on variations in student characteristics that existed before entrance into college than on the characteristics of the

Astin, A.W., "Undergraduate Achievement and Institutional 'Excellence'" 161 Science, 661-668. (1968) "Measurement and Determinants of the Outputs of Higher Education"
A.W. Austin,
See also, Lawrence, B., Weathersby, G., & Patterson, V. (Eds.), Outputs of Higher Education: Their Identification, Measurement and Evaluation. Boulder: Western Interstate Commission for Higher Education, (1970);
Astin, A.W., 136, "Productivity of Undergraduate Institutions," 129-135. (1962);
Astin, A.W., and J.L. Holland, "The Environmental Assessment Technique: A Way to Measure College Environments." 52, Journal of Educational Psychology 308-316. (1961);
Astin, A.W., and R.J. Panos, "Evaluation of Educational Programs." Chapter 19 in Educational Measurement, (1970)

The evaluation of academic institutions is doubly difficult because the intended outcomes of college education extend well beyond the condition of the student on graduation day; thus a comprehensive and direct indication of quality is never feasible.

Nevertheless, because the accreditation process focuses on a structure rather than educational accomplishments, programs and institutions with radical non-traditional structures cannot by definition satisfy existing structural criteria.[27] Evaluation of non-traditional programs will require that accreditation associations employ some of the techniques of the new evaluation methodologies which focus on the effects or outputs of a program or institution rather than how it is organized.[28] As Heffernan points out:[29]

> The imperative task confronting approval and accrediting agencies is to move from structural criteria to those of the efficacy and efficiency of instruction. If they fail this task, their utility will have passed.

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[27] Machlup observes in the time requirements of educational programs: "To sit in school for 9 or 12 or 16 years is perhaps an attainment in patient docility but not an educational attainment. Attainments of educational effort cannot be anything but matters of the mind, of the character, attitudes, working habits, or lifestyles. A *given* level of educational attainment can be the result of a *variable* number of years. One may learn slowly or fast, some people want to extend school from 12 to 16 years for everybody, even if the intellectual outcome is not perceptibly increased. My own ideal..is a system in which an enlarged and enriched curriculum is compressed from 12 into 9 and 10 years. To measure educational attainment in years is a swindle."
Machlup, F. "Perspective on the Benefits of Postsecondary Education," in *Does College Matter?*, edited by L.C. Solomon and P.J. Taubman, 355. (1972)

[28] See generally, Astin, A. "Some New Directions for Accrediting," Address at the seminar on "Validation of Accrediting Standards" National Commission on Accrediting, October 27, 1971, on file; Burns, N. "The Need for New Techniques of Evaluation." Memorandum for the Federation of Regional Accrediting Commissions of Higher Education. The Federation, 1972, on file.

[29] Heffernan, A. *Supra* at 165.

Heffernan further recommends that these new standards should focus on how measures of institutional impact:[30]

> "The level of competence students demonstrate at graduation (measures of achievement reached) and increases in the competence of students during their enrollment ("value added" measures):

The irony is that accreditation associations could end up adopting separate new standards for non-traditional programs while retaining out moded standards for conventional education. Conventional universities are likely to resist application of performance criteria to them because they have a vested economic interest in the tradition criteria. Fighting for their survival, they will not welcome another affront to their credibility. Since equity and common sense demand that accrediting agencies apply identical criteria of effectiveness and efficiency to all of its members, an irreconcilable conflict between traditionalists and the external degree movement could well emerge.

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[30] Heffernan, A. Supra at 168.

5.2.8 Lack of Due Process

In the past, it has been noted that the accreditation associations do not incorporate the requirements of due process in their decision-making process.[31] The type of due process necessary is procedural due process, the application of standards. In a more limited sense it is the adjudication phase of procedural due process. This means there must be (a) administrative regularity, or an orderly process thought out in advance and stated clearly in writing; (b) a reasurable relationship between the procedures and the agency's goals; and (c) opportunities for all parties to present their views and to protect their own interests. (A model framework for making accreditation decisions is accordance with due process requirements, previously prepared by one of the project investigators, is contained in Appendix F)).

The absence of procedural safeguards in accreditation adjudications creates the risk that external degree programs will be unjustly discriminated against by biased accreditation team members.

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[31] Puffer Report, Supra, at 235.

5.2.9 Response of the Regional Accreditation Associations to Non-Traditional Study

Despite the institutional weaknesses identified above, the leadership of the regional accreditation associations have encouraged innovation and experimentation. The official policy is contained in a statement on innovation promulgated in April, 1970, by the Federation of Regional Accrediting Commissions of Higher Education:[32]

> The Federation of Regional Accrediting Commissions of Higher Education welcomes perceptive and imaginative experimentation which aims at intensifying the effectiveness of higher education. The Federation supports no particular theories or styles of education or organization. Neither does it prescribe specific rules or formulas. It is cognizant that special requirements may pertain to some institutions, but these should not be permitted to inhibit new approaches and emphasis in their educational programs. The Federation insists only that new departures or adaptations be consistent with an institution's purposes and objectives as originally established or as modified to accommodate new conditions.

More recently, in an attempt to impose a uniform approach towards non-traditional study, the Federation issued an interim policy statement on accreditation and non-traditional study.[33]

The statement affirmed that accreditation procedures used by the regional associations should encourage innovation rather than retard it. Significantly, the FRACHE statement recognized that as a general matter the accrediting process should move toward assessment of the results of education rather than its processes, and the external degree movement provides an opportunity to do so.

The statement established three general policies to guide the actions of the regionals: (1) accreditation would not be considered until a number of individuals have been granted a degree; (2) accreditation procedures should be flexible and fair and evaluation committees should include persons who have experience in non-traditional programs; and (3) institutions which abandon non-functional traditional criteria aimed at assuring quality have the burden of proving the validity of alternative mechanisms for assuring quality control.

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[32] See Appendix D

[33] Id.

Six more detailed guidelines for academic institutions were promulgated:

Guideline (1) requires that institutions awarding degrees based heavily on non-traditional patterns of study must submit evidence that the degrees are awarded on the basis of definite criteria and demonstrated competency.

Guideline (2) requires that an institution use objective examination procedures for evaluating student performance.

Guideline (3) requires that publicity statements be factual.

Guidelines (4), (5), and (6) relate to contractual agreements between the institution and full-time faculty; adjunct-faculty; and unaccredited organizations.

Guideline (4) requires that full-time faculty avoid circumstances involving conflict of interest by using institutional resources and facilities inappropriately when participating as adjunct or part-time faculty in programs of study offered by other institutions. Guideline (5) requires that subcontracts with adjunct faculty and other learning resources be explicit and accompanied by a description of the means to be used for documenting and evaluating work done by the student. Guideline (6) requires that the term of subcontracts between unaccredited institutions with accredited institutions be made explicit and such contracts conform to the Federation's guidelines on "Contractual Relationships with Non-Regionally Accredited Organizations." (See Appendix D)

These six guidelines end with a statement that the major concerns are "the relation between student charges, services rendered, and benefits acquired," accountability for the delivery of services,and the use and availability of resources.

As a general matter it has been reported that non-traditional programs operated by regionally-accredited institutions have had little difficulty with the accreditation associations,[34] and a number have reported that the accreditation associations have provided encouragement and assistance.

There have been instances, however, known to the project's principal investigator, where faculty or administrators have misunderstood or overreacted to the position of the accrediting associations and then used the associations as an excuse for not undertaking non-traditional programs.

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[34] Interview with Stephen Plummer, formerly Dean, Special Programs, Antioch College, on file.

The problem with the "interim statement" is that it suffers from the same inadequacies which are inherent in the accreditation process as presently organized. The guidelines fail to address the following problems:

-- By accepting the principal of institutional accreditation rather than program accreditation, it is possible for an already accredited institution to mount a weak external degree program, and as long as it is a small part of the institution's overall effort it will likely be overlooked by Regional Accreditation teams. Under present procedures there is no way to focus the accreditation process on non-traditional programs so that specific evaluative judgments concerning them can be made.

-- Because the accreditation agencies do not view consumer protection as one of their primary functions, present accreditation procedures do not yield useful program information which can be easily understood by potential students. Comparative analysis of the value of different non-traditional programs will still not be made; lists of external degree programs which satisfy minimum educational standards and lists of programs which do not meet such standards will not be published.

-- The "Interim Statement" does not establish any minimum educational standards which can be objectively measured, such as whether students graduating from external degree programs achieve comparable results on objective tests as traditional students. Instead the statement typically focuses on structural issues such as whether the faculty is in a conflict of interest and whether the institution is making too much "profit" from its external degree programs.

-- The statement still envisions a traditional model, with non-traditional study turned on, rather than an entirely new model, such as a nation-wide technologically-based open university financed by private equity capital.

Despite FRACHE'S cautious embrace of non-traditional study, the individual Regional Accreditation Associations are likely to become more restrictive as the non-traditional movement expands and the more conservative constituents of accreditation close ranks to prevent competition from the new programs. Under the rubric of quality control the regional committees, if they continue to be controlled by traditionalists, may respond in force.

The next section explores the potential for judicial challenge of arbitrary accreditation association actions.

5.3 Possible Judicial Challenges to the Status of Private Accreditation Associations

5.3.1 Introduction

The law of private educational accreditation is sparse. Only three cases testing the authority of private accrediting agencies have resulted in judicial opinions published in court reports.-- the most important of which are the *Marjorie Webster Jr. College v. Middle States Association* opinions of 1969 and 1970.[1]

Marjorie Webster was a challenge to the nonprofit eligibility criterion adhered to by Middle States and generally followed by all regionals. The lower court accepted the plaintiff junior college's arguments and held the defendant association's policy invalid; the appellate court reversed, sustaining the validity of the policy. In the process the legal limits on the power of private accrediting agencies were extensively aired and three strands of evolving doctrine were developed. All three are of critical importance in considering the extent to which actions of accrediting agencies--regional, professional, or specialized--would be subject to legal attack if they resulted in a constraint upon the development of external degree and other innovative higher education programs.

The three doctrinal developments emerging from *Marjorie Webster* test the application to private accrediting agencies of (1) restraint-of-trade law under the Sherman Antitrust Act, (2) common law concepts concerning private associations operating in areas of public concern, and (3) the "state action" doctrine which subjects private entities exercising quasi-governmental power to the limitations of the United States Constitution. This section will expand upon the law and issues of that case, with particular reference to non-traditional education programs.

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[1] 302 F. Supp. 459 (D.D.C. 1969), rvsd., 432 F. 2d 650 (D.C. Cir. 1970). The other two cases, both like *Marjorie Webster* suits against regional associations, are *North Dakota v. North Central Ass'n,* 23 F. Supp. 694 (E.D. Ill. 1938) aff'd., 99 F. 2d 697 (7th Cir. 1938), and *Parsons College v. North Central Ass'n*, 271 F. Supp. 65 (N.D. Ill. 1967). See generally Kaplin, "The Marjorie Webster Decisions on Accreditation," 52 Educ. Rec 219 (1971).

5.3.2 Anti-Trust Theory

The Sherman Act[1] makes actions taken which restrain trade[2] among the several states[3] illegal. The language is unadorned, forcing the courts to "[i]nterpret its word [sic] in the light of its legislative history and of the particular evils at which the legislation was aimed"[4] The Court has said that the purpose of the Sherman Act "[w]as the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury"[5]

The major judicial gloss on the Sherman Act has come in the restriction of the Act to those activities which unreasonably restrain trade[6] This restriction came about as the result of the realization that "[e]very agreement concerning trade, every regulation of trade, restrains"[7] The principle by which the rule of reason is to be applied was established by the Court in Chicago Board of Trade v. United States:[8]

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[1] 15 U.S.C. 1 (1970)."Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...."

[2] Additionally, 2 of the Sherman Act makes monopolies, and attempts at monopolization illegal.

[3] The phrase "among the several states" indicates the limitation on the Act which is determined by the extent of Congressional power; i.e., the power to regulate interstate commerce. The interstate commerce power is now broadly interpreted, yet antitrust cases do fall for lack of the requisite jurisdictional showing (see Goldfarb v. Virginia State Bar Association, No. 73-1247 (4th Cir. May 8, 1974). Para 3 of the Sherman Act applies to the District of Columbia and other federal territories; under it no showing of interstate commerce is necessary.

[4] Apex Hoisery Co. v. Leader, 310 U.S. 469, 489 (1940).

[5] Id. at 493.

[6] The "rule of reason" originated in Standard Oil Co. v. United States, 221 U.S. 1, 60 (1910).

[7] Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

[8] Id.

> "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

The Court does not apply the rule of reason to every type of restraining activity, because it has determined after long experience that certain practices[9] are always unreasonably restrictive of trade:

> "[t]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable--an inquiry so often wholly fruitless when undertaken."[10]

Price-fixing, division of markets, group boycotts, and tying arrangements have been characterized by the Court as per se illegal under this summary approach.[11]

Certain practices of accrediting agencies are arguably subject to analysis as problems of antitrust law. For antitrust law to be applicable it must be demonstrated that the practice has caused a restraint of trade, not nessarily of such magnitude as to render survival impossible, but sufficiently detrimental as to have inhibited competition.[12]

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[9] United States v. Topco Associates, 405 U.S. 596, 607 (1971).

[10] Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958).

[11] Id.

[12] United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); Associated Press v. United States, 326 U.S. 1 (1945).

> When a school is denied accreditation it loses what "[i]n common understanding is tantamount to a certification of educational quality for the member school."[13] Schools lacking this certification are hampered in several ways. They find it more difficult, for example, to qualify for many types of federal aid[14] and to obtain money from private sources.[15] Unaccredited schools are disadvantaged in the competition for students because students often experience difficulty in transferring credits[16] and in gaining admission to graduate schools[17] when they leave unaccredited schools. States frequently require attendance at an accredited school as a prerequisite to professional licensing[18] Accreditation also plays an important role in the competition for faculty members[19] consequently affecting school's ability to attract research grants and students.

Before concluding that denial of accreditation works a restraint of a school's trade one must contend with the argument that what is restrained is not in fact "trade". This argument is based on the "learned professions" and "liberal arts" exemption to the Sherman Act, which purports to insulate certain activities falling within these two categories from antitrust liability[20] The exemption is judicially created, and appears to owe its origin to a passage appearing in an 1834 case, The Nymph:

> "[T]he word 'trade' is often and indeed, generally, used in a broader sense, as equivalent to occupation, employment or business, whether manual or mercantile. Whenever any occupation, employment, or business is carried on for the purpose of profit, or gain, or livelihood, not in the liberal arts or in the learned professions, it is constantly called a trade.[21]

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[13] Parsons College v. North Central Association of Colleges and Secondary Schools, 271 F. Supp. 65, 67 (N.D. Ill. 1967).

[14] Finkin, Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate, 2 J. LAW and ED. 339, at 348-63.

[15] Parsons College v. North Central Association of Colleges and Secondary Schools, 271 F. Supp. 65, 67 (N.D. Ill. 1967).

[16] Marjorie Webster, 302 F. S. 459 (D.D.C. 1969), F.F. No. 57.

[17] Parsons College v. North Central Association of Colleges and Secondary Schools, 271 F. Supp 65, 67 (N.D. Ill. 1967).

[18] See Grimm, "The Relationship of Accreditation to Voluntary Certification and State Licensure", SASHEP Staff Working Papers Pt. II, at I-11 to I-15 (Nat'l Comm'n. on Accrediting, (1972).

[19] 84 HARV. L. REV. 1912, 1914 (1971)

[20] The Nymph, 18 F. Cas. 506 (No. 10338)(CCC.D. Me. 1834) See discussions of the exemption at Coleman, Antitrust Exemptions, 33 ABA Antitrust Section 48 (1967). (Hereinafter cited as COLEMAN) Note, Antitrust Law: An Application of the Sherman Act to The Professions, 25 FLA. L. REV. 740 (1973). Nawalanic, Motives of Non-profit Organizations and the Antitrust Law, 21 CLEV. St. L. REV. 97 at 107-11 (1972).

[21] The Nymph, 18 F. Cas. 506 (No. 10, 388)(C.C.D. Me. 1834).

The Supreme Court has not spoken authoritatively on whether there is a "learned professions" and "liberal arts" exemption.[22] Reliance on the appearance of this passage from The Nymph in two Supreme Court Cases is unwise,[23] because the existence of the exemption was not at issue in either, and in the more recent case the Court stated that it was not deciding whether the exemption existed.

The treatment of this exemption is the lower courts has centered on the medical and legal professions. One U.S. Court of Appeals held that the practice of medicine was a trade for the purposes of the Sherman Act, in a involving a medical association's effort to hinder other doctors in their participation in a prepaid medical services plan.[24] In contrast, a federal district court in Oregon held in a Sherman Act case that the practice of medicine was not trade, or commerce.[25]

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[22] A comment in Federal Baseball Clubs of Baltimore, Inc. v. National League of Professional Baseball Clubs (259 U.S. 200, 209 (1972)). That "[p]ersonal effort not related to production, is not a subject of commerce", accompanied by an illustration of travelling lawyers, has been relied on as proof that the Court held that persons rendering personal services were exempt from the Sherman Act. Lower cases have clarified that the point at issue in the Baseball Case was the jurisdictional requirement of interstate commerce, not a sweeping exemption from the rendering of personal services. United States v. International Boxing Club, 348 U.S. 236, 243 (1955).

See Atlantic Cleaner's and Dyers, 286 U.S. 427 (1932), United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950). The gravestone for the personal services exemption was erected at Comment, Personal Services and the Antitrust Laws, 1 WAYNE L. REV. 124 (1955).

[23] Atlantic Cleaner's and Dyers, 286 U.S. 427 (1932); United States v. National Association of Real Estate Boards, 339 U.S. 485 (1950).

[24] United States v. American Medical Association, 28 F. Supp. 752 (D.D.C.) sustained demurrer; rev'd, 72 App. D.C. 12, 110 F.2d 703; cert. denied, 310 U.S. 644; 76 App. D.C. 70, 130 F. 2d 233 (1942); aff'd on other grounds, 317 U.S. 519 (1942).

The lengthy history of this case is a tribute to the intricacies of the learned professions exemption. The case involved the AMA's attempts to prevent the operation of Group Health Association, a non-profit, risk-sharing, prepaid medical services plan. The Supreme Court avoided decision on the professional exemption question by holding that the restraint of Group Health was a restraint of trade, because Group Health itself was not a learned profession, regardless of the occupations of its members.

[25] United States v. Oregon State Medical Soc'y, 95 F. Supp. 103 (D.Ore. 1950). The decision was upheld in the S. Ct., but on the grounds that a concerted refusal to deal was not process, (343 U.S. 326 (1951).

A case involving fee-setting by lawyers the Fourth Circuit, reversing the district court, held that the learned professions exemption was a defense to antitrust liability under the Sherman Act.[26]

The spareness of case law on the learned professions exemption, and the contradictory results reached by those few courts that have considered it, point to the conclusion that the very existence of the exemption is questionable. Its application to the practices of accrediting agencies will nonetheless be considered, because of the probability that this concept will emerge as important in future litigation.

The learned professions exemption has previously only been applied where the activity restrained is of a professional nature, and the entity imposing the restraint is part of the same profession.[27]

Thus, if accrediting agencies are to claim the protection of the exemption, it is not sufficient for them to claim that accreditation is a learned profession or liberal art. Rather, they must show that the activity restrained, the operation of a school, is an activity carried on in the learned professions or liberal arts.

Traditionally, theology, law and medicine were considered the learned professions.[28] Language in a recent minimum fee schedule suit[29] described the characteristics of a learned profession:

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[26] Goldfarb, v. Virginia State Bar Association, 42 L.W. 2581 (4th Cir. May 8, 1974) rev'd 355 F. Supp. 491 (E.D. Va. 1973).

This case arises out of a Virginia couple's attempt to find a lawyer for some real estate they were purchasing. The couple engaged in some comparative pricing among the area's lawyers, but were unable to find any who would charge less than the County Bar Association's minimum fee schedule prescribed. The district court held that the County Bar's activities violated the Sherman Act. This area has stimulated much commentary about the status of the learned professions and antitrust law. E.g., The Antitrust Division v. The Professions-"No Bidding" Clauses and Fee Schedules, 48 Notre Dame L. Rev. 966 (1973). The Supreme Court may choose to review this case, and clarify its position on the exemption.

[27] FN: It would appear from the language of the Sherman Act that only the nature of the activity which is restrained is relevant; that is, is trade or commerce restrained? Thus, in the Goldfarb case the statement is made that "[t]he occupation of one who violates the Sherman Act is irrelevant." A similar statement is found in the Supreme Court decision on the AMA cases. It is submitted that this is a misleading approach to the professional exemption. While it is true that one's professional status is no defense in a prosecution for setting the prices of commodities, it is also clear that the professional status of the restrained would not

be a defense for a non-professional accused of restraining a professional's activities. Because the exemption has previously been applied in such a manner as to free professionals from the scrutiny of the antitrust laws in their attempts at self-governance, it seems that the inquiry should be whether a learned profession was restrained, in the course of the profession's self-regulation.

[28] Webster, New International Dictionary 1976 (2d Ed. 1961), quoted in England v. Louisiana State Board of Medical Examiners, 126 So. 2d 51, 56 (La. Ct. App. 1960) (Cert. denied 1961); State Bar of Arizona v. Arizona Land Title and Trust Company, 90 Arizona 76, 366 P. 2d 1, 6 (1961).

[29] In re Lincoln Rochester Trust Co., 42 L.W. 2509 (N.Y. Ct. App. March 27, 1974).

> A profession is not a business. It is distinguished by the requirements of extensive formal training and learning, admission to practice by a qualified licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the market, a system for discipline of its members for violations of the code of ethics, a duty to subordinate financial reward to social responsibility, and notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation. These qualities distinguish professionals from others whose limitations on conduct are largely prescribed only by general standards and sanctions, whether civil or criminal.

Neither the traditional definition nor this passage gives any assistance to an argument that operating a school is a learned profession.

Nor is there any support for the proposition that operation of a school is a "liberal art". At best, if the school is a liberal arts institution, whose instruction has been restrained, one might argue it is a business carried on in the liberal arts, and therefore exempt under the Nymph dictum. However, because of the questionable authority of this passage,[30] and the lack of any other authority, it is unlikely, even in this context that courts will be quick to extend a "liberal arts" exemption to the operations of a school.

Even if it should be concluded that the learned profession, or liberal arts exemption applies to the operations of a school, the most recent case dealing with the learned professions exemption, Goldfarb v. Virginia State Bar Association,[31] established a significant limitation on the scope of the exemption. The Court of Appeals denied that it was establishing a blanket immunity for the learned professions from the antitrust laws, and carefully delineated the boundaries of its holding:

> [The "learned profession"] exemption is applicable only to those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws. We therefore conclude that the promulgation of a fee schedule has a sufficient part in the overall scheme devised by the State of Virginia to regulate the legal profession to claim the form of limited immunity to antitrust prosecution available under the "learned profession" exemption.[32]

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[30] The passage is of questionable authority because the Court's citation of it has always been dictum insofar as it relates to the learned professions and the liberal arts.

[31] 42 L.W. 2581 (4th Cir., May 8, 1974).

[32] Id.

In reaching its conclusion the court pointed to the many regulations adopted by the state which apply to lawyers alone, and observed that many of them were directly in conflict with the antitrust laws. The fee schedule, although not itself adopted by the state, was viewed as part of the regulatory scheme established by the state. Since the regulations which conflicted with the antitrust acts clearly enjoyed an immunity from the antitrust acts, the court was simply extending this immunity to a "part" of the regulatory scheme.[33]

Unlike the state's posture towards the legal profession, states have not revealed their intention to allow those operating schools freedom from the antitrust laws by any indications as clear as the imposition of regulations which conflict with these laws. More importantly, as will be urged below, it is not a necessity for accrediting agencies that they have freedom from the antitrust laws because the antitrust laws can be applied in a manner which does not conflict with reasonable practices of accrediting agencies.

Another theory concerning the professional exemption open out of the one case which concerned the relationship of the antitrust laws to the activities of an accrediting agency: Marjorie Webster. The Court of Appeals for the District of Columbia Circuit held that the antitrust laws were inapplicable to defendant Middle State's refusal to accredit Marjorie Webster because of the nature of the accrediting agency:

> "That appellant's objectives, both in its formations and in the development and application of the restriction here at issue, are not commercial is not in dispute. Of course, when a given activity falls within the scope of the Sherman Act, a lack of predatory intent is not conclusive on the question of its legality. But the proscriptions of the Sherman Act were 'tailored...for the business world', not for noncommercial aspects of the liberal arts and the learned professions. In these contexts, an incidental restraint of trade, absent an intent or purpose to affect the commercial aspects of the profession, is not sufficient to warrant application of the antitrust laws.[34]

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[33] FN: The court's opinion is unhelpful in its failure to reveal the balancing between "[t]he necessities of professional regulation and the dictates of the antitrust laws..." that it must have engaged in to have reached an "accord" between the two. Similarily, the court failed to explain its conclusion that fee schedules were a part of professional regulation.

[34] 432 F. 2d at 654.

In contrast to the previously discussed cases utilizing the learned professions exemption, the Court of Appeals' decision emphasizes the restrainor's purpose in acting.[35] The learned professions distinction is retained, however, in that only when one is discussing the noncommercial aspects of a profession[36] does the actor's purpose become important. The court's decision thus significantly narrows the learned professions exemption, by restricting the use of this defense to those whose actions lack a commercial intent.[37]

One problem which arises from the commerical intent doctrine is that critical questions about how the actor's intent is to be discovered are left unresolved. For example, a suit was brought by Crowell, Collier and MacMillian, a corporation which owned a number of correspondence schools, against National Home Study Council and its accrediting commission,[38] alleging violation of the antitrust laws because of the accrediting commission's decision to deny reaccreditation to the plaintiff schools.

The defendant accrediting commission was composed mostly of competitors of the plaintiff schools. Where the schools involved are proprietary, one suspects that the Marjorie Webster court would look with skeptism at assertions of noncommercial intentions. Financially pressed nonprofit schools may be as affected by considerations as proprietary schools, however, and difficult questions of intent are really present in every instance where

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[35] Note, the Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial" Activities. 82 YALE L.J. 313 (1972). This attention to the purpose with which a restraint is imposed had its origin in an important article by Professor John Coons, entitled "Non-Commercial" Purpose as a Sherman Act Defense, at 56 Nw. V. L. Rev. 705, 747 (1962). His thesis is that a non-commercial purpose can be a qualified defense to antitrust liability:

> "[a]ntitrust liability should depend upon weighing of the anti-competitive effects of defendants' activities, actual and intended, against the policy advantage of defendants' purposes and the likelihood of their realization through the means adopted. To the extent that the purpose is consistent with policy goals other than free competition, to that extent will it atone for the anti-competitive sins of the defendants committed in the course of its realization."

36 Thus, a school's purchasing policies would presumably not call for the application of this special standard. Analogously, courts have condemned price-fixing by professionals of commodities, without regard to the professional status of the fixers. United States v. Utah Pharmaceutical Association, 201 F. Supp. 29 (D. Utah 1962), Northern California Pharmaceutical Association v. United States, 306 F. 2d 379 (9th Cir. 1962).

37 The effect of this attention to the intent of groups which perform a certifying function has been criticized:

> "Assuming a worthy non-economic purpose, the application of the Sherman Act to the activities of a certifying board would be restricted to cases in which (1) direct proof of intent to use the certifying plan to exclude competitors from the market is available, or (2) the anti-competitive effect of the plan is so obvious that there is no need for an inquiry into the question of intent. Thus, by focusing exclusively on the issue of intent or purpose, both decisions foreclose inquiry into the actual effect of a certification plan and its reasonableness in terms of the Sherman Act. Under this view, the antitrust laws pose little threat to all but the most self-serving certification plan.

Wallace, Occupational Licensing and Certification: Remedies for Denial, 14 Wm. & Mary L. Rev. 46, 105 (1972) [hereinafter cited as WALLACE]. (The other decision referred to in this passage is Structural Laminates, Inc. v. Douglas Fir Plywood Association, 261 F. Supp. 154 (D. Ore. 1966), aff'd per curiam, 399 F. 2d 155 (9th Cir.1968); cert. denied, 393 U.S. 1024 (1969), where the district required a plaintiff injured by the arbitrary action of a trade association to show that the association had acted with "bad purpose" in failing to amend its certification standards.)

38 U.S. School of Music, Inc. v. Nat'l Home Study Council, complaint filed Dec. 13, 1969, (D.D.C.)(settled).

competing schools pass judgment on each other.[39]

The more fundamental problem that has been pointed to in the Marjorie Webster decision is that attention to purpose where anticompetitive restraints occur is contrary to:

> "[O]ne of the basic tenets of antitrust policy--a preference for untrammeled choices by consumers in competitive markets as the favored method of allocating finite resources and determining the success or failure of competing enterprises. The goal of any certification program for professionals is to influence the choices of consumers of professional services by encouraging them to rely on the fact of certification as an indication of competence and high ethical standing. The competitive process is disrupted whenever certification is awarded or denied unfairly because the consumer who relies on the fact of certification in choosing among the services of competing professionals has not made a choice on the merits. This disruption of the competitive process occurs regardless of the intent or purpose of the certifying board; the issue of intent or purpose in this context is largely irrelevant. Judicial treatment of certification problems should preserve the integrity of the consumer selection process as a method of resource allocation by encouraging the award of certification on the basis of merit."[40]

The existence of the "learned professions" exemption is open to question, and when adopted is subject to limiting conditions. Thus, if accrediting associations are not exempt from the antitrust laws it is important to determine how the antitrust laws should be applied.

The action of an accrediting agency, in refusing to admit a school to membership, for any reason, could be analyzed as a per se violation of the antitrust laws. The argument is that the association's failure to admit a school to membership is comparable, for example, to the action of the New York Stock Exchange in cutting off a member's wires, that action was held to be per se illegal because the ex-members were deprived "[o]f a valuable business service which they needed in order to compete effectively."[41]

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[39] FN: The Court of Appeals did not reject the idea that accrediting associations could have commercial motives, giving as an example an accrediting association which denied accreditation to schools which dealt with a supplier who did not give discounts to members of the association. The court did not delve into the grey area where the exclusionary criterion is not related to commerce, but the effect is a commercial benefit to some of the parties.

[40] Wallace at 107.

[41] Silver v. New York Stock Exchange, 373 U.S. 341, 347 (1963). See also 21 Case W. Res. L. REV. 314, 320 (1970), where the author describes Middle State's decision not to accredit Marjorie Webster as a concerted refusal to deal. Group boycotts were held per se illegal in two Supreme Court

decisions, Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) and Fashion Originator's Guild of America, Inc., v. F.T.C., 312 U.S. 457 (1941). Handler, in Recent Developments in Antitrust Law: 1958-1959, 59 Colum. L. Rev. 843, 852 (1959) saw in Klor's proof that when the Supreme Court "[p]roclaimed the per se unlawfulness of group boycotts, it meant precisely what it said. The prohibition is absolute. There are to be no exceptions, however,extenuating may be the conditions generating the boycott."

Neither the district court nor the appellate court in Marjorie Webster was swayed by this argument, and other courts have similarily resisted applying a per se analysis in what appear to be per se cases.[42]

The rationale for not employing the per se rule is important, for the rationale circumscribes the application of the rule of reason. One author, who would include most boycott situations within the rule of reason, has formulated an exception for concerted refusals to deal which involve denial of access to joint facilities:

> "The common characteristic of situations where the marginal gain in public policy purpose achievable only through collective economic power is likely to outweigh attendant harms in the industry's need for self-regulation through collective action.
>
> The need for industry self-regulation might be found not only in the express mandate of Congress, but in the structural requirements of the industry itself. The successful operation of the joint facility virtually compels some exercise of exclusionary power for such collective ventures as stock exchanges, wire services, and professional sports leagues.[43]

Because of the lack of effective state control over the quality of higher education, and the great need for indicators of quality, it is not difficult to argue that some form of "industry" self-regulation is necessary. Thus, one can expect that courts will be reluctant to condemn all self-regulation as per se illegal.

Given the framework that makes application of the rule of reason appropriate, what limits does it place on the practices of an accrediting agency?

A court applying the rule of reason should first satisfy itself that the particular practice at issue is reasonably related to the self-regulation which was thought desirable for the industry,[44] and a reasonable manner of achieving that goal.[45] Finally, notice a hearing must be provided.[46]

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[42] Bird, Sherman Act limitations on Non-Commercial Concerted Refusals to Deal, 1970 DUKE L.J. 247 (1970) [hereinafter cited as BIRD].
Note, Trade Association Exclusionary Practices; An Affirmative Role for the Rule of Reason, 66 Colum. L. Rev. 1486 (1966).
Important examples are: Molinas v. National Basketball Association of America, 190 F. Supp. 241 (S.D.N.Y. 1961); Deesen v. Professional Golfers Association of America, 358 F. 2d 165 (9th Cir.); cert. denied, 385 U.S. 846 (1966).

[43] Bird at 290-91.

[44] Trade Association Exclusionary Practices, n.45, at 1504-05; BIRD at 291. Thus, although it might be recognized that an association of sport players is necessary for the operation of the industry, the exclusion of players for reasons not related to ability at that sport would be outside the

reason for the industry-wide exemption, and hence *per se* illegal.

[45] *Id.*

[46] *Silver v. New York Stock Exchange*, 373 U.S. 341, 361-67 (1963). The court held here that the Stock Exchange's statutorily derived freedom from *per se* illegality under the antitrust laws was contingent on its providing procedural safeguards. The safeguards were said to be necessary because the reasons for allowing industry self-regulation- "to protect investors and promote fair dealing" - were hampered by secretive, unfair proceedings. The hearing requirement lessened the likelihood the Exchange would stray from its statutory purpose, and provided a record for judicial review.

Scrunity of exclusionary practices of accrediting agencies under the rule of reason should focus on whether the practice in question serves to further the quality of schools. The analysis of the trial court in Marjorie Webster[47] provides an excellent example of the application of the rule of reason to an exclusionary practice of an accredition agency. After ten weeks of testimony the court decided that an exclusionary criterion based solely on financial structure was not reasonably related to Middle State's goal of encouraging "[t]he achievement of higher quality..."[48]

In reaching its conclusion the court found, on the basis of extensive expert testimony, that "[e]ducational excellence is determined not by the method of financing but by the quality of the program".[49] This assertion is contrary to the judgment reached by Middle States[50] representing many of its member educators. However, the court was merely ordering the accrediting association to evaluate an institution, not to admit it. Thus, the trial judge did not upset a specific factual judgment about Marjorie Webster's quality but merely invalidated the accrediting agency's refusal to make such a specific judgment.

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[47] 302 F. Supp. 459 (D.D.C. 1969).

[48] *Id.* at 467. Note that the court judged the reasonableness of the exclusionary criterion in terms of Middle State's own objectives, not in terms of the policies that saved its practices from *per se* illegality. The court here concluded that the non-profit eligibility criterion was not *per se* illegal because they were "not so devoid of potential benefit or so inherently harmful as to fall into the above category without proof that it actually had the effect of restraining trade."

[49] *Id.* at 468.

[50] Brief for Appellant at 9, Marjorie Webster.

Finally, how effective a tool will the antitrust laws be under the theories presented against practices of accrediting agencies that operate to exclude innovative education? The decision of the Court of Appeals in Marjorie Webster offers little hope to a litigant, unless a convincing showing of commercial motive could be made. Under the rule of reason, in contrast to the learned profession, and commercial intent approach, the particular practice of the accrediting agency would be scrutinized for reasonableness, and the excluded innovative school would have the opportunity to demonstrate that the contested practice was not relevant to educational quality.

5.3.3 Constitutional Law: "State Action"

The limitations on the exercise of power emanating from the United States Constitution apply only to governmental, and not to purely private, activity.[1] Private accrediting agencies could therefore be subjected to federal constitutional restraints only to the extent their activities can be deemed "governmental" or "state action."

Courts over the years have devised various theories whereby ostensibly private activities, because of their connections with government, can be found sufficiently public or "quasi-public" to be deemed the actions of the state. But despite these theories, "the question of whether particular... conduct is private, on the one hand, or amounts to 'state action' on the other hand, frequently admits of no easy answer.[2] There is no "precise formula for recognition of state responsibility [for private acts].... Only by sifting facts and weighing circumstances can the non-obvious involvement of the State in private conduct be attributed its true significance."[3]

Marjorie Webster is the only case which has undertaken such sifting and weighing with respect to private accrediting agencies.[4] The district court utilized what might be called a "delegated power" theory to hold defendant Middle States subject to constitutional requirements. This part of the Report will discuss that theory with respect first to the Federal government and second to the state government, then will discuss an alternate "government contacts" theory and finally the nature of the constitutional restraints which would apply to accrediting if found to be "state action."

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[1] See generally Moose Lodge v. Irvis, 407 U.S. 163 (1972) and cases cited therein.

[2] Id. at 172.

[3] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961).

[4] The Parsons College case, note ___ supra, decided two years before Webster, did briefly discuss the state action issue:

> The fact that the acts of the [North Central] Association in granting or denying accreditation may have some effect under governmental programs of assistance to students or colleges does not subject it to the constitutional limits applicable to government, any more than a private employer whose decision to hire or fire may affect the employee's eligibility for governmental unemployment compensation.

271 F. Supp. at 70. For law review commentary on this question prior to Webster and Parson's, see Kaplin & Hunter, "The Legal Status of Educational Accrediting Agencies," 52 Cornell L. Rev. 104, 116-120 (1966).

5.3.4 Delegated Power Theory: Federal Government

This argument focuses on the accrediting agencies' role under Federal aid-to-education programs. Aid statutes commonly specify accreditation "by a nationally recognized accrediting agency or association" as a prerequisite to aid eligibility of an institution or its students.[5] Under some statutes, if an institution is unaccredited, it may nevertheless become eligible if "the Commissioner has determined that there is satisfactory assurance...that the institution will meet the accreditation standards of such an agency or association within a reasonable time[6]--a function which the Commissioner fulfills by accepting "correspondent" or "candidate" status with a recognized agency as evidence of eligibility.[7]

Under these statutory provisions pertaining to accreditation, the Commissioner is required to "publish a list of nationally recognized accrediting agencies or associations which he determines to be reliable authority as to the quality of training offered."[8] Agencies apply for, and the Commissioner grants, such recognition according to predetermined procedures and criteria, and the recognized agency remains subject to such criteria and to periodic review by the Commissioner.[9]

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[5] *See, e.g.*, Higher Education Act of 1965, §1201 (a)(5), 20 U.S.C. §1141(a)(5).

[6] *Id.* at §1201 (a)(5)(A), 20 U.S.C. §1141 (a)(5)(A). "Three-letter certification," *i.e.* certification by three accredited institutions that it accepts the non-accredited institution's credits on transfer, is also commonly specified as an alternative to accreditation. *Id.* at §1201(a)(5)(B), 20 U.S.C. §1141 (a)(5)(B). *See generally*, as to aid eligibility, Finkin, "Federal Reliance On Voluntary Accreditation," 2 J. of Law and Educ. 339, 343-368 (1973).

[7] *See Marjorie Webster*, 302 F. Supp. at 470.

[8] *See* note 5, *supra*; see generally Finkin, note 6, *supra*.

[9] See U.S. Dept. HEW, "Nationally Recognized Accrediting Agencies and Associations," March 1972 (a revision of the criteria for recognition is pending).

The district court in Marjorie Webster, recognizing these interrelationships between the federal government and private accreditation, concluded that "the regional accrediting associations have operated as service agencies for the Federal government in determining eligibility for funding" and that "the defendant in performing its accreditation function is engaged in a quasi-governmental function subjecting it to the restraints of the Constitution."[10] In overruling the district court, the Court of Appeals did not overturn this particular conclusion, stating instead that it would "assume, without deciding, that either the nature of...[Middle States'] activities or the federal recognition which they are awarded renders them state action subject to the limits of the Fifth Amendment [due process clause]."

Under this theory, if an accrediting agency recognized by the Commissioner were to refuse accreditation to or withdraw accreditation from an innovative school or program, it would be deemed to be acting as a delegate or agent of the Federal government whose decision would be scrutinized through constitutional lenses. While its application to accreditation is novel, the theory itself does have support in the case law. Substantial involvement by the government in private activities, or by private organizations in government activities, has often led to a finding of state action. In Public Utilities Comm'n v. Pollack, for instance, Congress had granted a bus company a monopoly franchise and subjected it to the regulatory jurisdiction of the D.C. Public Utility Commission. A dispute arose concerning the company's policy of installing radio receivers in its busses--a practice over which the Commission had jurisdiction and which it had previously condoned. Because the bus company held a "substantial monopoly" by government grant and exercised its franchise under the regulatory jurisdiction of a government agency with authority to regulate the matter at issue, the Supreme Court found "a sufficiently close relation between the Federal Government and the radio service to [constitute state action]..."[12] And in

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[10] Marjorie Webster, 302 F. Supp. at 478.

[11] Marjorie Webster, 432 F.2d at 658.

[12] 343 U.S. 451, 462 (1952).

Terry v. Adams, a private association ran white-only primary elections the winners of which were invariably elected in the subsequent government-run primaries and general elections. Because the state had essentially devolved upon the association the choice of who ran in the government primary, and because these private decisions had become an "integral of a public process," the Court found the private association's action to be state action even though the state did not control the private decision-making.[13]

Hawkins v. North Carolina Dental Society illustrates these principles in a context more analogous to accrediting. Plaintiff had been excluded from membership in the defendant society, allegedly because he was black. Under state law the Society had authority to appoint several members of the state dental licensing board and to nominate members of other state commissions. The court found the Society "to be functioning clearly as the agent of the state" and deemed its membership decisons to be state action. Even without an express finding of agency, state action was involved because the state "in some of its manifestations has involved itself in the Society's activities, and...the Society's exercise of its powers of practical control or significant influence in the selection of state officials is a public function performed under the general aegis of the state."[14]

This same comment can apply to accrediting agencies' role in the decision-making process for distribution of federal education funds; although the decisions being made differ from those in Hawkins, the relationship between government and private entities is similar. Likewise accrediting agencies' accrediting decisions are an "integral part" of a public process, as in Terry, and these decisions are made under a recognition system which accords individual agencies a "substantial monopoly"[15] over certain decisions affecting the general public much like the monopoly in Pollack.

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[13] 345 U.S. 461, 469-70, 484 (1953).

[14] 355 F. 2d 718, 722-23 (4th Cir. 1966).

[15] The Commissioner's Criteria for Recognition (supra note 9 and accompanying text) state that "it is unlikely that more than one association or agency will qualify for recognition (A) in a defined geographical area or jurisdiction or (b) in a defined field of program specialization within post-secondary or collegiate education."

A recent Supreme Court case counsels some caution, however, in expanding use of the state action doctrine. In Moose Lodge v. Irvis the Court refused to attribute state action to a private club's decisions concerning who it served at a bar which it ran by authority of a state liquor license. Neither the mutuality of interests and benefits between state and club regarding liquor control, nor the state's attendant regulatory involvement in the club's affairs, was sufficient to constitute state action. To make such a finding with respect to a private entity such as Moose Lodge, the Court would require that state involvement actually "foster or encourage" the allegedly wrongful activity or that it be so substantial as to "make the State a partner or...joint venturer in the ...enterprise."[16]

Though Moose Lodge certainly limits the reach of state action, the case is not likely to control the doctrine's application to accreditation. Accrediting agencies are poles apart from private fraternal organizations; their functions are far more public in character and impact;[17] their control over dispensation of government-controlled resources may be more monopolistic. And though the Commissioner's involvement probably could not be said to foster accrediting practices which constrain innovation,[18] this involvement--especially as reflected in the proposed new Criteria for Recognition--is substantial.[19] At least with respect to federal aid eligibility decisions, the Commissioner and the accrediting agencies seem clearly to be "partner(s) or...joint venturer(s) in the...enterprise." Other courts are likely to follow Marjorie Webster in holding the resulting relationship to be state action.

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[16] 407 U.S. 163, 176-77 (1972).

[17] See Kaplin, "Judicial Review of Accreditation: The Parsons College Case," 40 J. Higher Educ. 543, 544-547 (1969).

[18] One of the proposed new Criteria for Recognition, supra note 9, is that the agency "encourages experimental and innovative programs to the extent that these are conceived and implemented in a manner which ensures the quality and integrity of the institution or program."

[19] Supra note 9; see Finkin, supra note 6, at 370,374.

5.3.3 Delegated Power Theory: State Governments

The analysis here is similar to that above for the federal government. The same case law applies; what differs is the role which states play in accrediting in contrast to the role of the federal government. Since roles differ from state to state, a state action analysis would depend upon the particulars of each state's involvement with accreditation.

The district court in Marjorie Webster recognized that:

> Middle States' function as an agency to identify institutions of quality is not limited to its relationship with the Federal government. In states under its jurisdiction, it has been recognized as an agency to identify institutions of quality for purposes such as teacher certification, state loans and state scholarships.[20]

Moreover, as this report has detailed, states often rely on regional accreditation as a basis for determining the degree of regulation it will impose upon a school operating in the state; under the "accredited exception" policy, states often defer regulation of accredited institutions to the responsible accrediting agency.[21] A similar phenomenon exists under state licensure statutes and regulations which often expressly rely upon graduation from a program accredited by a professional or specialized agency to determine eligibility for licensure.[22]

Though states thus may rely upon accreditation to an even greater extent than the Federal government, this does not mean that the state action case is more easily made. As Moose Lodge as well as Public Utilities Comm'n v. Pollack illustrate, the degree of actual state involvement in private affairs is also an important consideration. States typically do not have a comprehensive recognition and regulation system as does the Commissioner. But other forms of involvement may exist, e.g. state agency representation in accrediting agencies, accrediting agency representation on state councils or examining boards, joint site visitations to schools and programs whose accreditation or reaccreditation is pending.[23] Whether state action is present partly depends upon the cumulative impact of these and other interrelationships at the state level.

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[20] 302 F. Supp. at 478. See generally Kaplin and Hunter, supra note 4, at 117-119.

[21] Pp. ____ - ____, supra.

[22] Grimm, "The Relationship of Accreditation to Voluntary Certification and State Licensure," SASHEP Staff Working Papers, Pt. II, at I-12 to I-15 (Nat'l Comm'n on Accrediting, 1972).

[23] Id. at I-14; Kaplin & Hunter, supra note 4, at 119-120.

Usually, however, it will be unnecessary to make a separate state action determination regarding the states. Most accrediting decisions which could adversely affect innovative programs at the state level will also affect them at the federal level. Thus both federal and state governments may be implicated in the same accrediting decision, making state action a determination based upon the cumulative effect of federal and state activity.[24]

5.3.6 Government Contacts Theory

This theory is utilized, in contrast to the delegated power theory, when government-accrediting interrelationships are not so formalized or direct as to constitute a "delegation" to accrediting agencies. If there are nevertheless significant contacts between government and the private entity, whereby the latter derives substantial power, property, or prestige from the former, state action may be found.[25] Many of the interrelationships between states and accreditors discussed in 5.3.5 and 5.3.6 above would probably shade into this contacts approach. This part of the Report will discuss one particular contact which has recently gained independent significance in court cases: membership of state schools in private educational associations.

These recent cases concern the National Collegiate Athletic Association--a private membership association of educational institutions which sets and enforces athletic standards for its membership.[26] NCAA thus performs in the athletic realm a function quite similar to what accrediting agencies perform in the academic realm. In Parish v. NCAA, a suit concerning NCAA's eligibility rules for student athletes, the court took note of defendant's operations and structure. It emphasized that at least half of NCAA's members are public institutions which by virtue of membership subject themselves to NCAA regulation and use government funds to pay dues which subsidize NCAA operations. The court found these contacts between public and private spheres sufficient to make NCAA's standard setting state action.[27]

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[24] This was basically the approach of the district court in Marjorie Webster; see notes 10 and 20, supra, and accompanying text. See also Simkins v. Cone Memorial Hospital, 323 F. 2d 959 (4th Cir. 1963).

[25] See, e.g., Burton v. Wilmington Parking Auth., supra note 3.

[26] See generally Koch, "A Troubled Cartel: The NCAA," 38 Law and Contemp. Probs. 135 (1973).

[27] 361 F. Supp. 1214 (W.D. La. 1973).

Parish has been followed in several cases, including at least one U.S. Court of Appeal decision. In Howard University v. NCAA, for example, the court reasoned that:

> [Individual institution's] athletic affairs and related educational polices are affected by the concerted action of the many state and federal institutions that participate as NCAA members in the promulgation and enforcement of the Association's rules, regulations, and procedures. This involvement by state and federal institutions is pervasive.[28]

The legal theory of these cases would clearly apply as much to accrediting agencies as to athletic associations[29]-- perhaps more so since accrediting is more tinged with public interest and impact than athletic regulation. But not all accrediting agencies will fit the theory. Many of the professional accrediting agencies are not institutional membership associations, thus making governmental participation and financial support in their affairs more difficult to pin down. And the membership agencies may have substantially fewer public school members than the 50% claimed by NCAA.[30] Whether smaller percentages of public membership, or government participation other than by membership, will still be sufficient to constitute state action are questions for the future which will depend upon a more precise analysis of the internal power structure and functions of each particular agency.

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[28] 367 F. Supp. 926,929 (D.D.C. 1973). Accord, Associated Students, Inc. of Calif. State U. v. NCAA, 493 F. 2d 1251 (9th Cir. 1974); Buckton v. NCAA, 366 F. Supp. 1152 (D. Mass. 1973); contra, McDonald v. NCAA, 370 F. Supp. 625 (c.d. Cal. 1974).

[29] See Kaplin & Hunter, supra note 4, at 119-120.

[30] At the time of the Marjorie Webster litigation, 110 of Middle States' 346 higher education members were public. 302 F. Supp. at 473. Comparable statistics for its secondary education members were not specified.

5.3.7 Effect of State Action Determination

If a particular action or activity of an accrediting agency is deemed state action, it would follow that that action or activity is subject to constitutional requirements applicable to state and federal governments. Thus when the challenged action or activity would be unconstitutional if undertaken by government, it would also be unconstitutional when undertaken by the accrediting agency.

Many constitutional requirements have little or no meaningful application to accreditation, for example the various provisions dealing with criminal prosecutions. Others may have some application in narrow (and probably extreme) circumstances, for example an accrediting dispute implicating academic freedom and thus the First Amendment's free expression and association guarantees. But for the most part, the constitutional guarantees most likely to be involved are the due process and equal protection clauses of the 5th and 14th Amendments.

Equal protection guards against discrimination--not all discrimination but only invidious (such as racial) or unreasonable discrimination.[31] According less favorable treatment to proprietary schools than to nonprofit schools is a discrimination, for instance, but at least in the eyes of the Marjorie Webster appellate court not an unreasonable one. Similarly, according less favorable treatment to external degree programs or to innovative programs generally would be a discrimination, but if it were reasonable in light of all the circumstances and the current state of educational expertise, such a discrimination would not violate equal protection.

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[31] See generally Developments in the Law, "Equal Protection," 82 Harv. L. Rev. 1065 (1969).

Due process has a broader potential application to accrediting than equal protection. It is also concerned with notions of reasonableness, as well as with basic fairness, but applies these requirements even where the accrediting agency treats everyone alike. Basically due process would require that accrediting decisions and standards not be arbitrary, irrational, or capricious, and that the procedures used in making decisions about a school's or program's accreditation be fair and provide the affected institution a reasonable opportunity for input into the decision-making process. This latter requirement, procedural due process, is probably the major constitutional legacy for accreditation subject to the state action doctrine.[32]

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[32] See generally Kaplin, "The Law's View of Professional Power," SASHEP Staff Working Papers, Pt. II, at J-25 to J-28 (Nat'l Comm'n on Accrediting, 1972).

5.3.8 Common Law Theories

The common law as a source of limitations on professional power in general, and the power of educational accrediting agencies in particular, has been discussed in some depth elsewhere.[33] Common law principles have also been discussed specifically with reference to educational accreditation in all three of the major court suits against private accrediting agencies.[34] This part of the Report will analyze these cases against the backdrop of emerging theories examined in the cited articles; the reader is referred to these articles for a more in-depth discussion of the applicable common law principles.

The *North Dakota v. North Central Association* litigation in 1938 was the first judicial foray into the accrediting world. Several personnel at North Dakota's State Agricultural College had been fired under allegedly questionable circumstances, and North Central's investigation of the incident uncovered adverse effects on faculty morale and upon educational quality at the institution. North Central threatened disaccreditation; the state sought a court injunction against such action.

The district court and appellate court opinions reflected a traditional judicial deference to private associations. Applying the common law of "voluntary associations" to North Central, and treating the accrediting agency as it would a social or athletic club divorced from the public eye, the courts rejected the state's suit:

> the Association being purely voluntary is free to fix qualifications for membership; and to provide for termination of membership of institutions which do not meet the standards fixed by the Association. The constitution, by-laws and rules of government of the Association measure the rights and duties of the members.[35]

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[33] *See* Kaplin & Hunter, *supra* note _____, at 108-116; Kaplin, "Judicial Review of Accreditation: The *Parsons College* Case," 40 J. of Higher Educ. 543 (1969); *see generally* Kaplin, "The Law's View of Professional Power," *SASHEP Staff Working Papers*, Pt. II (Nat'l. Comm'n. on Accrediting, 1972), at J-4 to J-18 and J-21 to J-25; Wallace, "Occupational Licensing and Certification: Remedies for Denial," 14 Wm. & M.L. Rev. 46, 74-88, 110-122 (1972); 89 ALR 2d 976 (and later case service); 20 ALR 2d 531 (and later case service).

[34] See note_____, *supra*, and accompanying text.

[35] 99 F. 2d 697, 700 (7th Cir. 1938), affirming 23 F. Supp. 694 (E.D. Ill. 1938).

The policy thus displayed is a general one of judicial non-interference with the internal affairs of private associations. The appellate court (quoted above) pointed only to a rules violation as a basis for overcoming this policy. The lower court opened the door only slightly wider: "in the absence of fraud, collusion, abitrariness, or breach of contract,... the decisions of such voluntary associations much be accepted in litigation before the court as conclusive..."[36] Only in rare circumstances, such as where an accrediting agency refused to accept applications from all institutions not fitting a highly specific mold worked out in 1900 and since unchanged, could this non-interference theory have significant impact on accrediting policies restraining innovation.

The second case, Parsons College v. North Central Association, is almost, but not quite, a bedfellow of the North Dakota case. In the 1960's plaintiff, until then an accredited school, was placed on probation by North Central, was then given a conditional reaccreditation, and finally had its accreditation withdrawn. The school's financial and educational practices--which some called innovative and others called irresponsible--were apparently at the heart of the dispute.[37] The school sued and asked the court to intervene in the matter, an invitation which the court declined.

The court began by suggesting that it's function was limited to determining whether the Association had violated any of its own rules in disaccrediting plaintiff -- the same form of judicial review emphasized by the appellate court in North Dakota -- and determined that it had not.[38] Plaintiff had strenuously urged that the court dig more deeply -- that it expand upon the slight opening suggested by the North Dakota lower court and set aside accrediting decisions which are "contrary to rudimentary due process or grounded in arbitrariness."

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[36] 23 F. Supp. at 699.

[37] See generally Koerner, The Parsons College Bubble (19__).

[38] 271 F. Supp. 65, 70-71, 74 (N.D. Ill. 1967).

Although not specifically approving this broader review standard, the court did examine defendant's conduct under it and found no violation.[39] The court's approach (though not necessarily its conclusions) provides a good example of how common law review of accrediting decisions is likely, in general, to proceed in future cases.[40]

Marjorie Webster, the third case, is another good example of "modern" common law review. Whereas Parsons College was primarily a procedural review of accrediting procedures, Marjorie Webster was primarily a substantive review of eligibility criteria (specifically, the nonprofit criterion). Courts are likely to proceed more cautiously, and to intervene less often and less comprehensively, when they are confronted with substantive questions, which are more alien to their expertise.[41]

This distinction between substantive and procedural review, along with a differing view of the harm befalling the college, explains the disagreement between the district and appellate courts in Marjorie Webster regarding application of common law principles to the case. The district court acknowledged the traditional policy of noninterference with the internal affairs of private associations, but it found an exception to that policy:

> [T]here is an exception when the association enjoys monopoly power in an area of vital public concern. If the power, because of public reliance upon it, is great enough to make membership a necessity for successful operation, judicial intervention may be justified.[42]

Applying this exception to the case, and thus measuring defendant's action by a more stringent review standard, the district court concluded that:

> Accreditation by the defendant association is necessary to the plaintiff if it is to successfully continue to operate as a junior college. Public policy requires that this power of the defendant must be exercised in a reasonable manner in the public interest. Exclusion of plaintiff solely because of its proprietary character is unreasonable and contrary to the public interest."[43]

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[39] Id. at 71-74.

[40] See Kaplin, "Judicial Review of Accreditation," supra note 1.

[41] See generally Kaplin, "The Law's View of Professional Power," supra note 1, at J-21, J-24, J-26.

[42] 302 F. Supp. 459, 469 (D.D.C. 1969).

[43] Id. at 478.

This kind of reasoning derives from a line of common law cases dealing primarily with professional societies, Falcone v. Middlesex County Medical Society being the most famous precedent in the line.[44] The Court of Appeals' decision in Marjorie Webster does not dispute these cases nor the potential application to accreditation of the common law principles enunciated by the district court. Rather, the appellate court declined on the facts in the record to apply the rule because the college was insufficiently harmed by lack of accreditation and because the accrediting action at issue was substantive rather than procedural:

> The extent of judicial power to regulate the standards set by private professional associations, however, must be related to the necessity for intervention. Particularly when, as here, judicial action is predicated not upon a legislative text but upon the developing doctrines of the common law, general propositions must not be allowed to obscure the specific relevant facts of each individual case. In particular, the extent to which deference is due to the professional judgment of the association will vary both with the subject matter at issue and with the degree of harm resulting from the association's action.[45]

Of the three cases, Marjorie Webster most clearly involves a possible restraint on educational innovation. The accrediting policy at issue--the nonprofit eligibility criterion--served to exclude all proprietary institutions from the "legitimate" world of higher education. Any innovation pioneered by the proprietary sphere of American enterprise and taking a business corporate form was thus subjected to burdens not suffered by nonprofit institutions. The resulting restraint was heavily emphasized by plaintiff in the litigation and clearly bothered the district court.[46] That court's "monopoly power" theory and "public interest" standard of review permitted specific appraisal of such policy considerations under common law principles. Though the Court of Appeals' use of this approach accorded far more deference to the accrediting agency, the approach is still suited to the analysis of pressing policy issues concerning restraints on innovation and is likely to play a prominent role in any future accrediting case squarely raising such issues.

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[44] 34 N.J. 582, 170 A. 2d 791 (1961). In Falcone the defendant medical society had excluded plaintiff, a duly licensed physician, from membership because of the nature of his medical training--thus making plaintiff ineligible for hospital privileges at area hospitals. The court ordered plaintiff admitted. See Wallace, supra note 1, at _____.

[45] 432 F. 2d 650, 655-56 (D.C. Cir. 1970); see generally pp. 655-658. For some continuing debate on degree of harm, see Godfrey v. Mass. Med. Service, 270 N.E. 2d 804 (Mass. 1971); Blatt v. U. of So. Cal., 5 Cal. App. 3d 935, 85 Cal. Rptr. 601 (1970).

[46] 302 F. Supp. at 470-471.

5.3.9 Conclusion: Possibilities for Reform Through Use of the Judicial Process

Underlying all three theories discussed above--antitrust, constitutional, and common law--are subtle policy considerations bearing upon the wisdom of judicial interference into private associational affairs. There are at least four factors which, overtly or covertly, will influence a court in determining whether, and how strenuously, to apply one or more of these theories to an accrediting agency:

> (1) the association's need for autonomy, (2) the nature and extent of the expertise that the association develops and applies, (3) the degree to which the functions of the association and the profession are of concern to the general public, and (4) the extent to which the association's actions can harm the public or a member or prospective member of the association. The greater the association's need for autonomy, and the greater its expertise, the smaller the likelihood of judicial intervention. The greater the public concern regarding the association's activities--and the greater the harm that the association can impose upon members, prospective members, or the public--the stronger the likelihood that courts should intervene[47]

These factors are suited to the analysis of accrediting actions which restrain innovation. In particular the extent of reliance upon expertise and the degree of harm befalling the affected school and the public would be crucial variables in the review of any such restraint. If in a specific case the balance of factors were to weigh against the accrediting agency, the court should conscientiously scrutinize its judgments.

The precise path of such scrutiny, of course, would depend on the theory being applied. But the way in which and extent to which the law limits private accrediting power is not likely to vary greatly from theory to theory. All three theories permit considerable judicial deference to accrediting agencies up to the point where an accrediting judgment appears to have substantial adverse impact upon the affected school or program. And then, under all theories, the accrediting agency can nevertheless prevail if its restraint on innovation is demonstrated to be "reasonable" in light of its own purposes and in light of public policy considerations. Moreover, challenges to the power of accreditation associations through the courts usually leads to long, protracted, and expensive litigation. While such litigation is underway the academic institution inevitably suffers adverse publicity, and declining student enrollments. We, therefore, conclude that in the near future litigation alone is not likely to accomplish comprehensive reform of accreditation practices. Although carefully planned litigation may provide some needed impetus, other means for reforming the accreditation associations should be pursued; and other alternatives besides accreditation reform for meeting the need for effective and a fair quality control of external degree programs should be considered.

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[47] Kaplin, "The Law's View of Professional Powers," supra note 33, at J-4.

6.0 THE ROLE OF THE FEDERAL GOVERNMENT

6.1 Federal Response to the External Degree Movement

6.2 Office of Education

6.3 Federal Trade Commission

6.4 Veteran's Administration

6.5 Conclusion

6.0 THE ROLE OF THE FEDERAL GOVERNMENT

6.1 Federal Response to the External Degree Movement

The federal government, through its education agencies, has warmly embraced the external degree movement as a means for stimulating change and innovation for post-secondary education. "Non-traditional studies" and "external degrees" are the latest jargon to be used by applicants in grant applications to the Fund for Post-secondary Education, the National Institute of Education and Office of Education, and at least a half dozen other agencies which fund research and demonstration programs in training and higher education. The potential abuses of external degree programs, and the consequent need for effective quality control, is less often recognized.

The federal government's interest in the quality of post-secondary education in general stems from the large flow of federal funds channeled to academic institutions.

The most important mechanisms presently employed to control the quality of post-secondary education are the Office of Education, the Veteran's Administration and the Federal Trade Commission.

6.2 Office of Education

Beginning with the Veteran's Readjustment Act of 1952 [1] and reaffirmed in subsequent Acts of Congress for an institution or program to be eligible to participate in federal funding, it must be accredited by some nationally recognized agency establised for that purpose. The Commission of Education is directed to maintain a public list of such agencies and associations "which he determines to be reliable authority as to the quality of the training offered by an educational institution." [2]

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1 Pub.L. 82-550, 66 Stat. 663 (1952).

2 38 USC 1775. a

Through the Accreditation and Institutional Eligibility Staff, which was formed in 1968, institutional eligibility is linked to two broad types of Federal program assistance: student financial aid, and direct institutional aid or support. Student financial assistance programs include the Basic and Supplemental Educational Opportunity Grants Program, the College Work-Study Program, the National Direct Student Loan Program and the Guaranteed Student Loan Program. Institutional support programs include programs such as that for strengthening developing institutions, the College Living Support Program and loans and grants for academic facilities.

The Office of Education relies almost exclusively on the accreditation associations to determine eligibility for federal funding for those programs.

Because of the large sums of federal money involved, eligibility for federal funds is a critical necessity for many schools and institutions.

This places pressure upon the accrediting agencies to submit any institution satisfying the most minimal criteria. Because of the inability of the accreditation associations to monitor academic institutions in the public interest, and because the states are generally lax and ineffective, little actual regulation of post-secondary education takes place. The efforts of the Office of Education to monitor the quality of education offered by academic institutions has been widely criticized and is being carefully scrutinized in hearings now being conducted by a special subcommittee of the Committee in Government Operations.[3/]

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[3] See generally Kirmstart, S., "Student Loans: How the Government Takes the Work Out of Fraud," *The Washington Monthly* (November, 1973); Testimony by George E. Arnstein and Harold Orlans before the Special Investigation Subcommittee of the Committee on Government Operations, U.S. House of Representatives, July 16, 1974, Draft on file.

In a widely circulated study commissioned by the Office of Education on Private Accreditation and Institutional Eligibility, it was concluded:

> "We agree with the objective (to separate accreditation from eligibility). We find it desirable from the standpoint of the public interest, of good management, of equity to unaccredited institutions and programs, and of preserving accrediting agencies' independence."[4]

One way of achieving this objective, the report recommended, would be:

> "by reviewing or eliminating reliance on accreditation in as many programs as possible and, above all, eliminating the exclusive reliance on accreditation and disaccreditation as the only means of qualification and disqualification in any means."[5]

On March 1, 1974, revised criteria for nationally recognized accrediting agencies and associations were published under notice of proposed rule making in the Federal Register.[6] The final version of these new criteria are currently in the process of being published, and it is anticipated that they will be effective soon.[7]

These new criteria place increased emphasis upon accrediting agencies' responsibility to the public interest and their reliability of operations.[8]

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[4] Orlans, H., and Associates, Brookings Institution, Private Accreditation and Public Eligibility, Volume II, 565 (1974).

[5] Id.

[6] See Appendix D for copy of the proposed new rules.

[7] See generally, Finken, "Federal Reliance on Voluntary Accreditation: The Power to Recognize as the Power to Regulate," 29, Journal of Law and Education, 348 (1973) for an argument that the commissioner of Education does not have the authority to regulate the accreditation associations, but only the administrative power to recognize them.

[8] Muirhead, P., Deputy Commissioner, Bureau of Post-Secondary Education, U.S. Department of Health, Education and Welfare. Before the Special Studies Subcommittee, Committee of Government Operations, U.S. House of Representatives, 8, July 17, 1974, Draft on file.

Not satisfied with these new OE criteria, Congressman Bell and Pettis proposed in Congress last year the "Postsecondary Education Consumer Protection Act of 1973." 9/ The Act authorizes the Secretary of H.E.W. to revise the criteria to be met by federally recognized approving entities to ensure that the approving agency monitors closely its member institutions in the consumer area. Institutions, for example, would be required to provide disclosure statements of their financial status, have fair and equitable cancellation and refund policies, and have clear statements describing the objectives of its program of education or training.

The legislation has been referred to the Committee on Education and Labor, where it will probably stay.

Because of the structure of the existing system, external degree programs and non-traditional studies will remain as unregulated by the Office of Education as every other institution in higher education.

As long as the external degree program is operated by a regionally-accredited institution, and the program represents a relatively small proportion of the total institution's efforts, it will be untouched by the Office of Education. As long as the institution substantially complies with regional accreditation association guidelines, it will remain accredited, and the institution's external degree programs will escape scrutiny.

Paradoxically, the truly innovative institution which may be worthy of federal assistance will be ineligible if it is unaccredited. As Peter Muirhead aptly pointed out in his recent testimony before Congress, "open universities, or external degree and other non-traditional programs 10/ is an eligibility dilemma currently facing OE "because it is not adequately amassed by statute, regulation or guidelines."

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[9] Postsecondary Education Consumer Protection Act of 1973.

[10] Muirhead, Supra note 8 at 20.

6.3 The Federal Trade Commission

The Federal Trade Commission is entrusted with the job of preventing "unfair or deceptive acts or practices in commerce..."[11] Based upon this authority, the Commission's Bureau of Consumer Protection[12] has taken aggressive action with respect to proprietary schools. On May 2, 1972, the Commission adopted a Proposed Statement of Enforcement Policy on Cancellations and Refund Policies of Private Schools.[13] This statement called for proprietary schools to adopt what is in essence a pro-rata refund policy. The Commission recently has been engaged in a four-part program designed to increase its effectiveness in policing proprietary schools. The program involves: (1) the promulgation of industry guides; (2) a consumer education campaign; (3) litigation involving restitution; and (4) increased efforts at federal/state cooperation and coordination.

One would hope that similar efforts could be directed at non-profit, accredited institutions of education. Unfortunately, the jurisdiction of the FTC is limited to profitmaking organizations.

In Community Blood Bank of Kansas City Area, Inc. v. Federal Trade Commission[14] the court held that the Federal Trade Commission did not have jurisdiction over a community blood bank and its hospital members, and the hospital's associations all of which were non-profit organizations. This was not because of the form of incorporation but because in their actual operation the organizations were devoted to community service and were not themselves obtaining a profit nor were their officers. The basis for the decision is that Section 4 exempts such associations defining the term corporation to include a corporation or association incorporated or unincorporated "which is organized to carry on business for its own profit or that of its members."[15]

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[11] Section 5, Federal Trade Commission Act, 15 U.S.C. 345 (a).

[12] See generally, Statement of J. Thomas Rusch, Director, Bureau of Consumer Protection, Federal Trade Commission, Before the Special Studies Subcommitee of the Committee on Government Operations, US House of Representatives, July 16, 1974, on file.

[13] Id.

[14] 405 F. 24 1101 (8th Cir. 1969)

Section 4 of the Federal Trade Commission Act thus operates as a shield for legitimate, bona fide eleemosynary institutions to protect them from governmental interference.[16]

It follows that external degree programs operated by nonprofit regionally-accredited academic institutions will be immune from FTC actions.

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15 15 U.S.C. 44.

16 But see, Bethany College and Divinity School, et.al., 49 I.T.C./ (1952); Ohio Christian College, et.al., FTC Docket No. 8820, where it was determined that the non-profit corporate form was only a device by which individuals sought private gain, using the shield of nonprofit corporate status to mislead and deceive the public. Prevention of these acts, the FTC concluded, were and are the function of the Federal Trade Commission as envisaged by Congress.

6.4 The Veteran's Administration

The Veteran's Administration administers the largest federal student aid program, the massive, two-billion dollar GI educational benefits program. The VA relies on a system of state approving offices for determining the eligibility of schools for program participation. The state approving agency system resulted from the need for approval of courses for Veteran's benefits because regional accreditation is institutional and thus offers no assurance of quality of specific courses. In addition, the GI bill requires the VA to abstain from federal control of education, thus it must rely on some non-federal agency to provide assurances of minimum quality.[17/]

In practice, the state agencies concentrate their energies on proprietary schools which are inspected twice again and are subjected to detailed regulations and reporting requirements. Although agency staff may, if they wish, approve separate courses at regionally-accredited institutions, they have chosen to rely, like the Office of Education, on regional accreditation as the criteria for eligibility.[18/]

Section 1775 of the U.S. Code states that an approving agency may approve an institution's courses if they "have been accredited and approved" by an accrediting agency recognized by the Commissioner of Education.

The educational activities of the VA were recently the subject of a Congressionally mandated study by the Educational Testing Service.[19/] The ETS study concluded that "the Veteran's Administration has currently no means of measuring the quality of the

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17 See generally, Arnstein, G., "The Accreditation Debate," Change (Winter, 1973-74)

18 42 U.S.C. §1775

19 See generally, Report of Educational Testing Service, Princeton University, on Educational Assistance Programs for Veterans, House Comm. Print No. 81, 93rd Congress, 1st Session, September 19, 1973.

performance of state approving agencies, and therefore cannot be assured that the money used to reimburse these agencies was wisely spent." 20/

The report also concluded that there was no practical means of monitoring directly the quality of education offered. Thus, we find again, the external degree programs operated by nonprofit, regionally accredited institutions are insulated from any kind of quality control.

[illegible] generally, Report [illegible]

20 Id at 3.

6.5 Conclusion

Because of the lack of federal authority to regulate directly higher education, a complicated and uncoordinated non-system has evolved which does not serve the public interest. Perhaps it is time for more direct federal regulation of higher education in the interest of the consumer. A central recommendation of the second Newman Report comes close to this:

> We have thus proposed that HEW distinguish eligibility criteria and procedures from accrediting criteria and procedures, to recognize organizations--including accrediting agencies--willing to apply these criteria as opposed to accreditation standards, establish a commission to hear appeals of eligibility denial, and require institutions to publish SEC-type prospectuses as a form of consumer information. Thus, we seek not to federalize accreditation, but merely to limit the federal involvement.[21] (our emphasis)

A strong case could be made for federal legislation in the external degree field which would authorize the Commissioner of Education to set his own standards for determining eligibility of external degree programs for federal funds. There is already precedent for direct accreditation by the Commissioner of Education when it has been determined that there is no nationally recognized accrediting agency qualified to accredit institutions in a particular category.[22] Although it is common to argue that since the United States Constitution neither delegates power to regulate education to the federal government nor prohibits it to the states; the power resides in the states by virtue of the tenth amendment, the authority to regulate could easily be based on the commerce clause. As indicated above, the commerce clause in the United States Constitution grants Congress power "to regulate commerce...among the several States..."[23/] As construed by the courts, this language gives the federal government very extensive authority to regulate, and to preempt state regulation of, activities in or affecting interstate commerce,[24/] including higher education activities.[25/]

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[21] Newman, "A Preview of the Second Newman Report," 4 Change 28,33 (1972).

[22] 79 Stat. 1247 (1965), 20 U.S.C. § 1085(a) (Supp. I 1965) (reduced-interest student loan insurance under Higher Education Resources and Student Assistance Act):

> If the Commissioner determines that...there is no nationally recognized accrediting agency of association qualified to accredit schools in[a particular]...category, he shall, pending the establishment of such an accrediting agency or association, appoint an advisory committee, composed of persons specially qualified to evaluate training provided by schools in such category, which shall (i) prescribe the standards of content, scope and quality which must be met in order to qualify schools in such category to participate in the program pursuant to this part, and (ii) determine whether particular schools...meet those standards.

For provisions to the same effect see 79 Stat. 1048 (1965), 20 U.S.C. §996 (a) (Supp. I 1965)(vocational student loan insurance); 79 Stat. 1251 (1965), 20 U.S.C. s 403(b) (Supp. I 1965) (national defense loans and fellowships); 77 Stat. 76 (1963), 20 U.S.C. § 751(f) (5) (1964) (Higher Education Facilities Act of 1963); 79 Stat. 679 (1965), 15 U.S.C. § 1352 (Supp. I 1965) (State Technical Services Act of 1965). See also, Kaplin, W.A., and Hunter, P.J., "The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Government Regulation," 52 Cornell L.Q. 127 (1966).

The Commerce Clause is now recognized as a grant of authority permitting Congress to enact all appropriate laws for the protection and advancement of commerce among the states,[26/] whatever measures Congress might reasonably think adapted to the end.[27/]

The interstate character of external degree programs, and the failure of the states to enact uniform legislation which protects their citizens from fraudulent programs without discriminating against out of state institutions, are persuasive reasons for some form of national intervention. The inherent limitations of the regional accreditation associations--the focus on regional sections of the

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23 Art. I, §8, #3. The full text provides that

> The Congress shall have power...To regulate Commerce without foreign nations, and mong the several states, and with the Indian tribes;...

See generally Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1 (1824); Schwartz, Constitutional Law ch. 4 (1972).

24 See, e.g., Perez v. United States, 402 U.S. 146 (1971); Katzenbach v. McClung, 379 U.S. 204 (1964). As to preeption, see, e.g., Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973).

25 See Maryland v. Wirtz, 392 U.S. 183 (1968); Cornell University, 183 NLRB No. 41, 74 LRRM 1269 (1970).

26 e.g., NLRB v.Jones & Laughlin Steel Corp., 301 U.S.1(1937).

27 United Staess v. Darby, 312 U.S. 100 (1941); United States v. Wright and Darby Co., 315 U.S. 110 (1942).

country; the focus on accrediting institutions rather than programs; and the focus on residential, traditional academic institutions--would justify a finding that they are not a reliable authority as to the quality of education or training offered by external degree programs.

Advocates of non-traditional study, as well as students, should welcome a strong, central authority that could develop nation-wide, uniform administrative standards, particularly in the areas of fraud, misrepresentation, deceptive advertising and discrimination.

Since we believe that it is an unlikely possibility that Congress will in fact pass such legislation, other alternatives for controlling the quality of external degree programs are explored in the section that follows.

7.0 FINDINGS AND RECOMMENDATIONS

7.1 Summary of Findings

    7.1.1 In General
    7.1.2 The States
    7.1.3 Federal Action
    7.1.4 The Accreditation Association

7.2 The Need for a New National Council of External Degree Granting Institutions

7.3 Conclusion

7.0 FINDINGS AND RECOMMENDATIONS

7.1 Summary of Findings

7.1.1 In General

The existing mechanisms for regulating the quality of traditional higher education are breaking down as private universities and colleges threatened with financial collapse adopt the practices of the marginal proprietary schools. The advent of the external degree and non-traditional study programs blurs the distinction between "legitimate" degrees and "phoney" degrees, making the need for quality control more urgent. Our key finding is that there is too little regulation of higher education rather than too much. What is needed is more governmental and accreditation association control over both public and private education if the public interest is to be served. The only way for innovative programs and institutions to gain credibility is for them to be subjected to rigorous analysis based upon objective facts. Otherwise, they will suffocate as the traditionalists, operating through state education agencies and the accreditation associations, mobilize to preserve the status quo.

7.1.2 The States

With respect to the states in particular, it was found that there is a great variation in the effectiveness of the states in setting standards. Many states have no regulatory machinery which applies specifically to accredited higher education; others, such as New York and Massachusetts have a long history of involvement in regulating the quality of education. There is a need for uniform state legislation, like the model statute prepared by the Task Force of the Educational Commission of the States. Such legislation should not exempt accredited institutions of higher education, and should cover all types of programs and institutions--nonprofit, profit-making, residential, external degree, etc. State legislation should focus on the enforcement of administrative standards, e.g., questions of consumer fraud, financial solvency, and deceptive advertising, as distinguished from educational standards, e.g., the number of clock hours required to get qualify for a degree. We think that the states are uniquely competent to undertake the former responsibility. States make judgments in these areas in other fields all the time and personel can be easily recruited from within state government to staff enforcement agencies. States are the one unit of government closest to the problem, and can have the necessary legal authority to be effective. Accreditation associations have neither the capability, the authority, or the willingness to be policemen. On the other hand, we do not think that the state should take responsibility for mandating academic standards at the college and graduate school level, except where a program is so devoid of academic content that the issue is one of fraud. Most states wisely refrain from making such judgments and rely on the accreditation associations for such judgments. Assumption by the states of the accreditation function could lead to fifty different ideas of what higher education ought to be. At a time when experts cannot agree, when new innovations are being introduced almost daily, and when national networks of higher education are emerging, it would be foolhardy to maintain that each state develop the competence to make consistent and infomed judgments about educational quality. Moreover, local state agencies are subject to pressures from local academic institutions to preserve their territories. If New York State, which is reputed to have one of the most progressive systems of higher education, acts in an arguably arbitrary way towards an foreign institution like Antioch College, what will be the response of other states to similar incursions?

To academic institutions, subjected to arbitrary and capricious state power, we would recommend litigation. Violations of procedural due process, such as failure to grant a hearing, failure to give adequate notice, and failure to provide a right to counsel, can be prevented.

We found in a number of instances that neither state educational officials nor applicant academic institutions, understood that the safeguards of procedural due process applied to their actions.

We also found that while states do have almost unlimited power to legislate educational standards for domiciliary academic institutions, they have less power over foreign academic institutions operating academic programs which are found to be in interstate commerce. The interstate commerce clause of the U.S. Constitution prohibits the states from excluding foreign academic institutions operating academic programs which are found to be in interstate commerce.

7.1.3 Federal Action

At the federal level, we found that there is no agency responsible for protecting the consumer rights of students enrolled in accredited institutions of higher education. Because the Office of Education has relied almost exclusively on the accreditation associations for determining whether a school is eligible for federal funds, and because the accreditation associations are weakest in the area of consumer protection, students have been bilked out of millions of dollars. Although the proprietary institutions have been mainly at fault, non-profit accredited institutions also are guilty of consumer abuses.

The problem with the accreditation associations is that their standards are too lax, rather than too strict. Under pressure to include every institution in order that they may establish eligibility for federal funds, they have lost credibility because they fail to make the discriminations which are at the heart of the accreditation process.

All alternative to accreditation might be reliance on those states which have effective regulatory machinery for establishing eligibility for federal funds. This would enable the accreditation associations to concentrate on the educational evaluation process, an area arguably within their competence.

Finally, we would recommend that Congress grant the Federal Trade Commission authority over nonprofit universities and colleges. The FTC's jurisdiction could be concurrent with state agencies or limited to those cases where a state has failed to establish appropriate machinery at the state level.

7.1.4 The Accreditation Associations

In section 5.0 we discussed the weaknesses of the accreditation associations, speculated upon their response to the external degree movement, and assessed the possibilities of reform through the judical process. We concluded that the practical possibilities of reform through litigation would be costly and time consuming. Only under certain narrowly circumscribed set of facts, would a litigant have a chance of prevailing in the courts. The most realistic opportunity for reform lies in the proposed revised criteria of the Office of Education for recognizing accrediting agencies. These new guidelines are designed to make the accreditation associations more accountable to the public interest. For example, agencies will be required to include public representatives on their decision-making bodies; to accord due process to institutions seeking accreditation, and to maintain a program of evaluation of its educational standards which is designed to test their validity. Nevertheless, they do not address the central problem of the accreditation associations which is their non-selectivity. The effort to minimize the proliteration of accreditation associations has resulted in six regionals which admit almost everyone. This democratic posture nullifies their usefulness as evaluation agencies. Similarly, external degree programs which requires more rigorous analysis rather than less, may escape the scrutiny of the regionals because they could be implemented under the cover of an already accredited institution. Radically new, innovative institutions which might employ such emerging technologies of cable-TV, microfilm publishing, and data retrieval; might fail to receive regional accreditation. Yet, the public needs information on both types of programs; and the true innovation deserves a period of experimentation. We would, therefore, recommend some form of direct federal regulation of nation-wide, multi-regional external degree programs. We recognize, however, that there is much Congressional reluctance to give the federal government more power to regulate in the field of education. We propose, therefore, as a more modest alternative the creation of still another accreditation agency which specializes in external degree granting institutions.

7.2 The Need for a New National Council of External Degree Granting Institutions

As the financial noose tightens around higher education, both private and public, traditionalists will seek to preserve the status quo: e.g., the physical campus; large libraries; low faculty student ratios; lock-stop course scheduling; tenure, etc. They will fight the introduction of new technologies, the use of lay professionals as faculty, and new ways of organizing and managing universities without physical boundaries. They will resist, because there are large economic, as well as emotional stakes, in the existing system. For the external degree movement to survive it must organize itself and demonstrate that its techniques and methods are effective. The burden of proof is always on those who would try something new.

As a framework for such concerted action, we would recommend the creation of a National Council of External Degree Granting Institution. This new agency ideally should be establish within the framework of the existing accreditation associations, perhaps as a National Commission of the New Council on Postsecondary Education. It's major purpose would be to conduct a form of specialized accreditating by evaluating external degree programs operated by both regionally-accredited and non-regionally-accredited institutions.

To satisfy Office of Education and National Commission on Accrediting, criteria for recognition as a nationally recognized accreditation agency, it should be national in scope and focus on programs leading to a standard undergraduate degree (B.S. and B.A.) and non-professional graduate degrees (M.S., M.S., Ph.D.) not presently accredited by a specialized accreditation agency. The accreditation process would focus on programs as well as institution. Such an organization would be justified because of the urgent need to evaluate external degree programs; and the need for the development of national standards for programs; and the need for the development of national standards for programs that operate on a national basis, rather than a regional one.

This new agency would be oriented exclusively toward the public interest, rather than toward member institutions.

It's governing board could be composed of individuals concerned primarily for the public welfare, faculty and other educators with experience in non-traditional programs, students, and representatives from other member institutions.

Evaluations of member institutions would be disseminated to the public so students and other interest parties can decide on their own whether the institution meets their needs, and is worth an investment of time and money. State agencies could also use such evaluations in making licensing judgments.

The Council would publish a list of programs and institutions which have been refused accreditation, as well as those which have been accredited. Accrditation would be for a limited period of time and the burden of proof would be on the institution for renewal.

The staff of such an association should be individuals who are not bound by traditional assumptions of what higher education is or should be. They would be responsible, together with other research organizations and practitioners in the field, for developing verifiable standards which measure the performance of an institution in objective terms.

Such standards should be used to establish a rating system and programs would be rated on a scale in the same way that private financial advising services rate municipal bonds.

The Council would be impowered to establish policies and criteria to which institutions and/or their programs of study will be required to adhere in order to gain and maintain an accredited status.

The Council would not deny the right to be evaluated to an institution or program of study solely because of the type of control or type of financial support.

Funds to finance the new Council could come from five sources: (1) institutions and programs of study being examined for accreditation; (2) professional members who derive indirect benefits from accreditation; (3) consumers; (4) foundations; and (5) federal and state governments who could use accreditation reports in making various eligibility determinations. An additional source might be selected federal agencies such as the National Institute of Education, which have a mandate to innovate in education. Supporting a research and evaluation program which is integrated into the organizational structure of a specialized accreditation agency can be a fast way to stimulate change in higher education and to disseminate the results of demonstrations at low cost.

7.3 Conclusion

We believe that some form of joint action among non-traditionalists is required to provide quality control of external degree programs. Without quality control the quick buck artists will quickly move into the field, and the violent reaction by the academic community will destroy the good programs as well as the fraudulent. At the time that this is written we are not optimistic that the states will fill the vacuum, nor are we confident that the regional accreditation associations can be reformed internally within a short period of time. Congressional passage of new legislation authorizing direct federal regulation of postsecondary education could take forever and may never will happen. Thus, creation of a new specialized accreditation agency, organized to serve the public, seems to be a modest and realistic proposal which could be implemented in the near future. It is a minimum action which could be taken to satisfy the need for quality control of innovative postsecondary education programs.

LEGAL AND OTHER CONSTRAINTS TO THE DEVELOPMENT OF EXTERNAL DEGREE PROGRAMS

Volume II

Final Report

Performed Under Grant NE-G-00-3-0208
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VOLUME II

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APPENDIX A

AN ANALYSIS OF STATE STATUTES GOVERNING FOREIGN, ACCREDITED INSTITUTIONS OF HIGHER EDUCATION

The purpose of this Appendix is to provide background information on state statutes and regulations which govern the regulation of foreign, nonprofit accredited institutions of higher education. The Appendix focuses on state law that applies to nonprofit, regionally-accredited institutions of higher education which operate outside of the state in which they have been incorporated and are domiciled. The material is designed to be used by: foreign institutions expanding their programs into a foreign jurisdiction; state policy-makers and legislators who need to know what actions other states have taken in response to the external degree movement; and policy-makers at the national level who need to view the development of external degrees as a nationwide development which cuts across state lines.

ALABAMA

The Alabama regulatory scheme requires schools to secure a permit to operate in the State (Title 52, 646). To procure a permit, a school must post a $10,000 surety bond and satisfy the Department of the adequacy of its curriculum, facilities, record-keeping procedures, and the "good moral character" of the school's employees. The statute exempts from its operations, however, "Colleges offering academic courses toward a recognized and valid degree" and "any resident private school that is accredited by a nationally recognized accrediting agency approved by the United States Office of Education" (Tit. 52, 644 (g) & (i)).

The latter category is not excused from the fee and bond requirement. "Resident private school" is interpreted to mean a school which is incorporated in the State, and has physical facilities in the State, not just a branch campus.

Foreign accredited schools are unlikely to meet with difficulties in operating in Alabama, because the Department generally exempts regionally accredited schools from the act (by interpreting "[t]owards a recognized and valid degree" as signifying regional accreditation). A high degree of administrative discretion is apparent in the statutory scheme, as evidenced both by the interpretation and the standards for a permit.

SOURCES:
Telephone conversation with Mr. E. C. Stevens

State Department of Education
State Office Building
Montgomery, Alabama 36104

Tit. 52, Para. 641 *et seq*.

ALASKA

Alaska's regulation of higher education consists of two articles which restrict the conferring of diplomas and the use of collegiate names (A. 14.47-010-14.47.060 and 14.47.100-14.47.140), Both articles exempt "schools approved by the Northwest Association of Secondary and Higher Schools or listed in the Educational Directory of the United States Office of Education" (14.47-040 (3) and 14.47.130 (3)).

SOURCE:

Dr. Marshall L. Lind, Commissioner
Department of Education
Pouch F,
Juneau, Alaska 99801

Alaska statutes, paras. 14.47.040 through 14.47.040 (1971).

ARKANSAS

Arkansas requires the consent of the State Board of Education to the incorporation of an institution of learning (64-1409). The standard for approval is apparently "[i]t being understood that the course of study shall be equal or equivalent to the customary courses of similar institutions" (64-1409). Only lawfully incorporated institutions can grant degrees, and one year of residence is required for a degree (64-1408).

The residence requirement is not applied to foreign schools (conversation with M. Olin Cook), and Arkansas has no other regulations applying to them.

SOURCE:
Statutes:

64:1401 through 64:1415

Department of Higher Education
401 National Old Line Building
Little Rock, Arkansas 72201
M. Olin Cook, Director
501/371-1464

ARIZONA

Arizona regulates the conduct of technical and business schools (defined as schools which prepare individuals for technical occupatio[illegible]) operating in the State (ARS, sections 15-931 through sections 15-945). The statute excludes "[p]rivately owned academic schools engaged in the process of general education which is designed to produce a level of development equivalent to that necessary to meet the requirements for matriculation in a public tax supported college or university in Arizona that may incidentally offer technical and vocational courses as part of the curriculum" (ARS, section 15-931(d)).

There is no other regulation of higher education, and several out-of-state schools are now offering courses and degrees in the State. The Regents are considering legislation to remedy the lack of regulatory authority.

SOURCE:

ARS, sections 15-931 through 15-945

Arizona Board of Regents
State Education Building
1535 West Jefferson
Phoenix, Arizona 85007
Lawrence E. Woodall, Executive Coordinating Officer
602/271-4082

CALIFORNIA

State of California
Department of Education
H. E. Summers, Chief
Bureau of School Approvals

California regulates schools operating in it by restraints on the issuance of degrees and diplomas. Schools, which at the time the degree is granted, or the diploma issued, have full accreditation by a national or applicable regional accrediting agency recognized by the United States Department of Health, Education and Welfare, Office of Education, are exempted from this regulation upon the submission of an affidavit of accreditation with the Superintendent of Public Instruction (sections 29007(a)(1) and (3)(d).

Although it might appear from this description that foreign accredited schools would meet with no barriers in attempting to operate in California, such has not been the case. The State has been reluctant to admit schools accredited by a distant accrediting agency. One method implementing this protectionist attitude has been the denial of Veteran's approval for courses offered by the foreign school.

SOURCES:

Private Colleges, Schools and Institutions Generally:
Section 29001 through section 29019

COLORADO

Schools which do business or maintain a place of business in Colorado must as a prerequisite to awarding degrees, restrict admissions to those who have successfully completed high school, or its equivalent, and have a majority of its credits in a degree field transferable to at least one school which is accredited by one of the six regional accrediting agencies (§124-21-3). The Act is administered by the State Department of Education.

Additionally, Colorado has a Proprietary School Act which regulates institutions which offer business, trade, technical and industrial instruction. (§146-3-1 through §146-3-14).

SOURCES:

State Department of Education

Statutes:

§124-21-1 through §124-21-5

The Propriety School Act of 1966--§146-3-1 through 146-3-14.

CONNECTICUT

To confer a degree, operate a program of higher learning, or use a name designating an institution of higher learning in Connecticut , one must have authority from the Commission for Higher Education (section 10-330). The Commission requires any foreign school planning to establish a branch, or to offer twelve or more hours in any one semester to apply for an evaluation of its plans, before it can be licensed or accredited (section 10-330-4 "Policies and Procedures for Licensing and Accrediting Institutions of Higher Learning in Connecticut "). The foreign school is then subject to the same evaluation as local schools.

The Regulations promulgated pursuant to this statute are wide-ranging, and non-specific, except for the minimum credit hour requirements for degrees. (Committee for Higher Education, "Policies and Procedures for Licensing and Accrediting Institutions of Higher Learning in Connecticut," section 10-330-18(c) (1970)). Connecticut recently directed the Commission of Higher Education to study new methods of granting degrees and credits, including external degrees by examination, and gave the board for state academic awards authority to operate a program (CGSA, section 10-330a(Cumm., Supp. 1974)). Also, proprietary schools may be licensed and accredited ((GSA, section 10-330 (Cumm. Supp. 1974)).

SOURCES:

CGSA, sections 10-330, 10-330(a)
Commission for Higher Education, Policies and Procedures for Licensing and Accrediting, Institutions of Higher Learning in Connecticut.

Commission for Higher Education
340 Capitol Avenue
Hartford, Connecticut 06101

DELAWARE

Delaware requires, as a condition of incorporation of degree-granting institutions, that the State Board of Education give approval (8 Del. C., para. 125). The State also has a statute governing private business and trade schools (14 Del. C., Para. 8501-29 (1972 Supp.)).

There are no restrictions on out-of-state schools which wish to operate in Delaware, and foreign schools are presently offering courses leading to degrees in Delaware.

SOURCES:

Delaware Statutes:

8 Del. C., section 125
14 Del C., section 8501-29 (1972 Supp.)

Spoke to:

Dr. Elizabeth C. Lloyd
Director of Teacher Education to Professional Standards
State Department of Public Instruction
Townsend Building, Dover, Delaware 19901

FLORIDA

Florida has a licensing scheme for nonpublic colleges operating in the state, and for agents of nonpublic colleges who solicit within the state (246.081). "Colleges accredited by an accrediting agency recognized by the United States Office of Education or the state board of education" and "[C]olleges whose credits or degrees are accepted for credit by at least three accredited institutions of higher learning," which means "those institutions who have notarized letters from appropriate officials from colleges accredited by an accrediting agency recognized by the United States Office of Education or the state board of education, stating the credits are accepted with no limitation of their full acceptance such as validation upon successful completion of a probationary period such as a quarter or semester or full time work," are exempted from the operation of the statute.

Foreign accredited schools are not regulated by any other provisions of Florida law.

SOURCES:

Statutory authority: Florida Statutes, Chapter 246, Nonpublic Colleges

State Board of Independent Colleges and Universities
Florida Department of Education
Tallahassee, Florida 32304 (904/488-8695)

GEORGIA

Georgia has a Proprietary School Act which regulates schools which train students for business, trade, technical or industrial occupations (32-2303(b)). The statute exempts from its operation

> "[p]rivate colleges and universities which award a baccalaureate, of higher degree, and which maintain and operate education programs for which credits are given. A majority of such credits must be transferable to a college, junior college, or university accredited by a National recognized accrediting agency (sic] accepted and approved by the State Board of Education" (sec. 32-2304b(g)).

Even if a school is subject to the provisions of the Act accreditation is accepted in lieu of satisfaction of the substantive criteria of the Act (32-2308b(c)).

There are no other regulations applicable to foreign schools operating in Georgia.

SOURCES:

State Board of Education
Proprietary School Advisory Commission

Georgia Proprietary School Act
Sections 32-2301b through 32-2321b

HAWAII

Hawaii requires educational institutions to possess a license from the director of regulatory agencies as a prerequisite to granting degrees or using a collegiate name.(§§4460-3 and 4460D-8) The regulatory scheme is interesting in that the only standard for the license is that the institution we chartered as a nonprofit corporation, and that "[t]he educational program of the applicant has been accredited by at least one nationally recognized accrediting agency or association listed by the United States Commissioner of Education or, if not accredited, that credits granted by the applicant in the specified educational program are accepted if granted by an accredited institution by not less than three accredited institutions" (§446D-4) Schools which fail to meet this requirement may be awarded a temporary permit to grant degrees if the director "[d]etermines that the applicant's academic and financial plans for working toward accreditation are feasible and acceptable". (§446D-5)

SOURCES:

Director of Regulatory Agencies

§446D-1 through §446D-15

IDAHO

Idaho has a certificate of compliance requirement which applies to persons selling courses in Idaho, and to persons offering degrees in the state. The requirement specifically includes persons outside the state who are performing the regulated acts within the state. The statutory scheme exempts "courses offered by an educational institution accredited by a national or regional accrediting agency recognized by the state board of education". (I.C. §33-2402), and there are no other statutory requirements aimed at these schools

SOURCES:

Correspondence and other private courses:

I.C. §33-2401 through §33-2412

Education corporations: I.C. §33-3901 through §33-3910.

contact: State Board of Education
State of Idaho
413 Idaho Street
Boise, Idaho 83702

ILLINOIS

Illinois regulates privately-operated colleges, junior colleges and universities under the authority of a statute which requires what schools procure the approval of the Superintendent of Public Instruction prior to operation. The regulations promulgated pursuant to this statute divide their requirements into permission to operate, and permission to grant degrees. Office of the Superintendent of Public Instruction Rules for the Regulation of Privately-Operated Colleges, Junior Colleges and Universities. Degree-granting institutions established prior to July 17, 1945, that are accredited by an accrediting agency recognized by the United States Office of Education are deemed to be in compliance by annually filing a catalogue and any other requested information. For those schools not within this exception the requirements for permission to operate concern such areas as the rationale for the institution, the appropriateness of the courses for achieving the school's goals, the adequacy of the institutional staff, the entrance policies, the availability and custody of student records, the financial resources of the institution, and its compliance with applicable statutes. Similar inquiry is made of a school which desires to grant degrees. These requirements are nonspecific and appear to hold no special problems for innovative schools.

Degree-granting is regulated in another statute, which also designates the Superintendent of Public Instruction as Administrator. [144 §225 through 144 §242] This statute requires that schools which are not residential to satisfy special criteria before being allowed to grant degrees. [144 §235]

SOURCES: Ill. R.S. 144§§121-135
Ill. R.S. 144§§121-135
Ill. R.S. 144§§136-161 (Business and Vocational schools)

Office of Superintendent of Public Instruction Rules for the Regulation of Privately-Operated Colleges, Junior Colleges and Universities (Private Postsecondary Educational Institutions)

The Honorable Michael O. Bukalis
Superintendent of Public Instruction
State of Illinois
302 State Office Building
Springfield, Illinois 62706

INDIANA

Indiana has an extensive, wide-ranging regulatory scheme for Indiana schools which offer "instructional or educational services or training in any technical, professional, mechanical, business or industrial occupation" (28-6206 (a)). The regulatory scheme applies to all schools "doing business in this state". However, schools which are privately endowed, chartered to award baccalaureate and advanced degrees, which don't offer occupational training (as defined by HEW) and are accredited by an agency listed by HEW are exempt from the operation of the regulations (2.04(g) Rules and Regulations of the Indiana Private School Accrediting Commission), and any other regulation. Even exempt schools must file a statement indicating why it is exempt. Significantly, this exemption will be lost if the Consumer Protection Agency, shows a violation of the regulatory provisions of the chapter (2.03(b) Rules and Regulations of the Indiana Private School Accrediting Commission).

The standards applied to non-exempt schools are oriented towards consumer protection, including such areas as facilities, instructors, advertising techniques, charges, and refund policies. (§10, Standards for Private Occupational Schools, Indiana Private School Accrediting Commission-identical to the statutory provisions found at IC 20-1-19-10.)

SOURCES:

Private Schools-28-6206 through 28-6229
(IC-20-12-62-1 through IC-20-1-19-24)

Rules and Regulations of the Indiana Private School Accrediting Commission

Contact: Indiana Private School Accrediting Commission
ISTA Building
Suite 810
150 West Market Street
Indianapolis, Indiana 46204

IOWA

Iowa's sole provision respecting the granting of degrees by Iowa corporations is that

> "[n]o academic degree for which compensation is to be paid shall be issued or conferred by such corporation or by any individual conducting an academic course unless the person obtaining the said degree shall have completed at least one academic year of resident work at the institution which grants the degree" (section 504.12).

Although this provision appears to apply to foreign schools granting degrees in Iowa, it apparently has not been an impediment to the operation of extension courses in Iowa by foreign schools.

SOURCES:

Sections 504.1 through 504.13

Robert J. Barak
Director, Research to Information
State Board of Regents
Grimes State Office Building
Des Moines, Iowa 50319

KANSAS

Kansas has adopted a Proprietary School Act ("Proprietary" includes nonprofit schools) which requires a certificate of approval for operation within Kansas. The Act exempts from its operation:

> "[p]rivate colleges and universities which award a baccalaureate, or higher degree, which maintain and operate educational programs for which credits are given. A majority of said credits must be transferable to a college, junior college, or university accredited by a national recognized accrediting agency listed by the United States Office of Education under the provisions of chapter 33, title 38, U.S. Code and such subsequent federal legislation as is approved by the state board. (79-4920(f))

Kansas has:

> "[n]o written policies governing non-profit institutions accredited in another state, offering or planning to offer college or graduate level degrees of [sic] courses in Kansas" (Letter of 11/21/73 from C. Taylor Whittier, Commissioner of Education).

SOURCES:

Commissioner of Education
Kansas State Department of Education
Kansas State Education Building
120 East 10th Street
Topeka, Kansas 66612

Kansas Proprietary School Act
Section 72-4916 through section 72-4940

Letter of 11/21/73 from C. Taylor Whittier, Commissioner of Education

KENTUCKY

Kentucky requires all colleges which grant degrees, or use the names "colleges" or "university" to procure a license from the superintendent of public instruction (KRS 164.945 through 164.947). The statute is silent on the subject of foreign schools, but apparently will be applied to them. The substantive content of the licensing requirements will be contained in standards and procedures adopted by the state board of education, on the recommendation of the council on public higher education. The only statutory guideline concerning the content of these regulations is that they insure that "the programs of preparation are comparable to the generally accepted standards of collegiate instruction with respect to faculty, curriculum, facilities, and student cost and that there is full disclosure with respect to the philosophy and purposes of the institutions and their capacity to fulfill these objectives" (KRS 164.947).

Agency: Council on Public Higher Education
Capital Plaza Office Tower
Frankfort, Kentucky 40601
502-564-3553

References: statutory KRS 164.945 to 164.947

LOUISIANA

The Louisiana State Board of Education has the "[a]uthority to approve private schools and colleges whose sustained curriculum is of a grade equal to that prescribed for similar public schools and educational institutions of the state." [L.S.A. - RS 17:411] This power apparently modifies the authority given to four-year institutions offering a minimum of one-hundred eighty days of learning to grant degrees [L.S.A. -RS 17:2051]. Louisiana also has a Board of Regents, with authority over public higher education; (LSA-RS 17:3121 at seq.).

SOURCE:

Louisiana State Board of Education

MAINE

Schools in Maine which wish to grant degrees or use titles which indicate the ability to grant degrees ("college," "university," etc.) must be authorized to do so by an Act of the Legislature (20, section 2202).

The legislative authorization is made upon the basis of a recommendation of the State Board of Education, Office of the Commissioner of Educational and Cultural Services (20, section 2202).

Until legislative approval is granted schools may use collegiate names by procuring temporary approval from the State Board of Education. The Board procures advice on formulating its regulations from the Higher Education Council, which is composed of representatives of all the nonprofit colleges in the State.

The standards and regulations for approval are comprehensive and far-ranging. Only the financial standard (which requires that a school have a contingency fund which when added to student fees is equal to a year's operating costs - Standards for Temporary Approval, 3-G) is specific; the other standards and regulations are nonquantitative. They require that the school be nonprofit, and include evaluation of the school's governing board, degrees, admission requirements, faculty, counseling facilities, library, and general physical facilities. In addition, the sponsors of a program must demonstrate that there is a "need" for the higher education program. The evidence to support this assessment of "need" should include:

> "(1) A survey of the demand or need in the area or state for the kind(s) of higher education proposed; (2) a statement of need in terms of the enrollment predictions made by the 1966 report of the Advisory Commission for the Higher Education Study. (This study set enrollments in Maine's private institutions at 12,000 in 1975 and 15,900 in 1985.); (3) the probable relation of the new program to, and its effect on, similar ones in existing institutions; and (4) a judgment of the proposed institution in the context of national needs and opportunities; and (5) relevant information concerning the student body to be served."
> Regulations for Temporary Approval of Higher Education Institutions, Adopted by State Board of Education, March 13, 1970.

MAINE (CONTINUED)

Educational institutions coordinating programs approved by the State Board of Education with degree granting educational institutions in Maine are excused from these provisions (section 2202).

Comments:

The "need" requirement was said not to have functioned as a barrier to foreign schools, despite the apparent emphasis on it in the regulations.

Sources:

20, section 2251 (1973-4 supp.)
20, sections 2202-03
Regulations for Temporary Approval...
Standards for Temporary Approval

Wayne H. Ross
Director
Higher Education Services
Department of Educational and Cultural Services
Augusta, Maine 04330

MARYLAND

Maryland has three different statutory schemes aimed at higher education. The first requires educational institutions to secure a certificate of approval prior to operation on the state. (Art. 77 §12 (1972 Cumm. Supp.) The statute requires that approval be given when the "[c]onditions of entrance, scholarship, educational qualifications, standards and facilities are adequate and appropriate for the purposes, program, training and courses to be taught or given therein" (id.)

The second regulates solicitors, but excludes those who solicit for "accredited" schools. (77 §146).

The third requires degree-granting institutions to procure the approval of the State Department of Education (77 §154). The statute requires the educational institution to supply information about itself; it does not attempt to evaluate the quality of the offerings. Schools accredited by agencies recognized by the State Department of Education may be excused from compliance with this statute. (77 §154 (e)). Those schools which do not conduct resident instruction (defined as "in person") may grant degrees, but only after an examination of their physical facilities, faculty, and record-keeping procedures (77 §155).

In practice, out-of-state institutions need only obtain approval from the State Superintendent of Schools. The approval is generally given when a school is regionally accredited. (letter of 11/29/73 from H. David Reese, Assistant Director in Certification and Accreditation, Maryland State Department of Education.

SOURCES:

Maryland State Department of Education
P.O. Box 8717
Friendship International Airport
Baltimore, Maryland 21240

Art 77 §12 (1972 Cumm. Supp)
Art 77 §146 through §159

MASSACHUSETTS

Basic Requirements

Section 30 of Chapter 69 of the General Laws of Massachusetts sets forth the Commonwealth's basic college authority statutory provisions, and gives the Massachusetts Board of Higher Education specific regulatory authority over Massachusetts organizations with respect both to degrees and collegiate names. Section 31 of the same chapter adds additional stipulations for Massachusetts organizations seeking degree authority at the associate, or "junior college," level.

Section 31A of Chapter 69 states:

> "No educational institutions located with the commonwealth shall award degrees unless authorized to do so by the commonwealth."

Section 89 of Chapter 226 of the General Laws sets a penalty for an individual, school, or college which offers or confers degrees "without having lawful authority to confer degrees."

The Board of Higher Education treats foreign schools the same way it treats domestic schools, and it will conduct an independent examination "of the the constitution, its faculty, equipment, courses of study, financial organization, leadership and other material facts relative thereto." (Chapter 69 & 30) The Board will undertake an independent examination even though the Institution is accredited by a regional association.

On the authority of a letter from the Department of the Attorney General to the Board of Higher Education, March 24, 1972, the Board has the power to review and authorize "the proposed granting of degrees, ... based on courses conducted in Massachusetts, by an educational institution incorporated in another state."

Special Provisions

There are some specific statutory standards which apply to junior colleges incorporated within the Commonwealth and which could be applied to out-of-state institutions. The following requirements could hinder the development of non-traditional study:

> "the institution has an adequate library, adequately housed, properly catalogued, has an adequate supply of current periodicals, including scientific and research journals if such journals are properly related to the courses of study offered, and has a satisfactory annual appropriation for its continued maintenance."
>
> "Teaching or classroom hours of teaching in the institution do not exceed eighteen hours weekly, and classes are ordinarily limited to thirty students and the ratio of students to instructors above the level of assistances is not unreasonably excessive."
>
> "The institution, if seeking to provide a program equivalent to the first two years of the standard college program, offers work in at least five separate departments: English, mathematics, foreign languages, natural sciences and social sciences."

Chapter 69, Section 31

Comments

Massachusetts indicates that they have an open attitude toward institutions from other states, and identify Antioch College, the Union of Experimenting Colleges and Universities, Goddard College, and Pace University, School of Education as examples of out-of-state institutions operating within the state.

Nevertheless, incorporation and the securing of degree-granting authority from the Massachusetts Board of Higher Education are the only legal long-range possibilities for out-of-state institutions.

The Board is supporting House Bill No. 2153, which clarifies its degree granting authority.

The bill amends Section 31A to provide that:

> "No educational institution chartered, located, offering courses, or otherwise doing business within the Commonwealth shall award degrees unless authorized to do so by the Commonwealth; nor shall any educational institution chartered, incorporated or organized in another state conduct within the Commonwealth any courses leading to the award of a degree, whether or not such degree is to be conferred within the Commonwealth, unless such educational institution has received the approval of the Commonwealth for such courses. Implementation of the provisions of this section is the responsibility of the Board of Higher Education."

SOURCES:

Chapter 69 S 30 through 69 31A, Chapter 226 S 89.

Fact Sheet, Out-of-State Institutions Operating Academic Programs within the Commonwealth of Massachusetts, May 1974, available from Board.

Telephone conversation, William P. Moore, Assistant Vice-Chancellor for Academic Affairs, Board of Higher Education, May 30, 1974.

Contact

Massachusetts Board of Higher Education
1[illegible]2 Tremont Street, 14th Floor
Boston, Massachusetts 02111

MICHIGAN

Foreign nonprofit corporations doing business in Michigan (MCL §450.97) are admitted under the same terms that apply to domestic corporations. Before educational corporations can file their articles of incorporation the State Board of Education must approve the school's facilities, educational progams, teaching facilities, faculty, and certify that at least 50% of the school's capital has been paid in or reduced to possession (MCL §450.171). A school's authority to conduct itself as any given type of school depends on the type of capital that it has; for example, a school with capital of less than $500,000 (but more than $100,000) can only use the name "junior college", and conduct classes at that level. The use of the name "university" is limited to schools with a capital of more than $500,000, and additionally requires that "the degrees or certificates to be offered to enrollees" and "the internal administrative organization of the enterprise" be consistent with those of "reputable and existing public and private universities in Michigan." ("policies of the State Board of Education in respect to approval of corporations with educational purposes"). Credit hour requirements for degrees are also established (Id.) with regard to faculty the policies state that "[p]art-time instructors should not constitute the bulk of the teaching staff." (Id).

The State Board's disapproval powers are apparently not circumscribed by the requirements contained in the statutes and policies. Any degree granting institution domiciled outside of Michigan and offering a degree program in Michigan must be approved by the State Board of Education for operation. Act 327, P.A. 1931 as amended, gives control of any educational corporation to the State Board of Education. Act 142, P.A. 1964, places the same requirements on unincorporated institutions. Other Sections of the Corporate Code, related to agents operating in Michigan, require registration of the corporation which the agent is representing. In substance then, no out of state institution may operate in Michigan without the approval of the State Board of Education. Statutes make no differentation between private and nonpublic institutions. The State Board of Education has approved the operation of one undergraduate degree program from another state (Missouri) to operate in Michigan, with a maximum of no more than 30 hours to be taken in Michigan. "[b]ecause of the competition for students, staff for the Department has recommended to the State Board of Education that no new institutions (of any degree level) be authorized to operate degree programs in Michigan".

Only one foreign school has been permitted to operate in Michigan, pursuant to this policy.

SOURCES:

MCL 450.97 (Foreign Nonprofit Corporations)
MCL ss450.170-450.177 (Educational Corporations)

Letter from David F. Hanson, Education Specialist, Accreditation and Approval
State of Michigan, Department of Education, December 20, 1973.

CONTACT:

Superintendent of Public Instruction
State Board of Education
Lansing, Michigan 48902

MINNESOTA

Minnesota has an extensive regulatory scheme which applies to "[a]ny person, within or without the state, that maintains, advertises, solicits or conducts any course of instruction for profit or a tuition charge..." [MSA §141.21 subd.5]. The statute exempts from its operation colleges which are "authorized" by Minnesota, do any other state, to grant degrees [M.S.A. §141.35].

The act requires that schools procure a license, which is conditioned upon payment of $200 (MSA §141.25 subd. 8(A)), and satisfaction of minimum standards. The standards are nonquantitative, but as interpreted may potentially inhibit external degree programs. The commissioner must approve the school's financial condition, training facilities, instructors, premises, course content and living quarters. [MSA §141.25 subd. 7]. The act's strongest provision concern the contents of the school's enrollment contract, catalog, and refund policy.

The commissioner of education implements the act, with the advice of the Minnesota advisory commission on private trade, business and correspondence schools.

SOURCES:
Commissioner of Education
MSA §141.21 through 141.36

MISSISSIPPI

The "Mississippi School and College Registration Law" [75-60-1 et seq.] requires a certificate of registration before instruction is offered, diplomas given, or enrollment solicited [75-60-9]. However, the Act exempts "[a]accredited private colleges and universities..." from its provisions.

E.E. Thrash, Executive Secretary and Director, of the Board of Trustees of State Institutions of Higher Learning, indicated in a letter that, "we find no state laws or policies set forth by the Board of Trustees which pertain to the establishment of degree programs by our institution."

SOURCES:

Regulations for Mississippi Proprietary School and College Registration Law, Title 75, Chapter 60, Private Schools and Colleges, Mississippi Code of 1972, Amended, Regular Session of 1974.
Letter of February 28, 1974, from E.E. Thrash, Executive Secretary and Director of "Board of Trustees of State Institutions of Higher Education."

CONTACT:

Mr. Joe C. Baddley
Executive Secretary
Mississippi Commission of Proprietary School
 and College Registration
P.O. Box 771
Jackson, Mississippi 39205

MISSOURI

Missouri engages in no regulation of higher education. The educational corporation act (VAMS §352.010 through §352.240) contains no standards relating to the quality of the institution.

Foreign educational corporations need only file a request for approval as a foreign corporation.

The Commission on Higher Education plans for higher education, and serves a "coordinating function", but on a non-mandatory basis. (letter of 11/20/73 from Director of Academic Research, Planning and Development, Commission on Higher Education.)

sources: VAMS §352.010 through §352.240 letter of 11/20/73 from Robert W. Jacob.

SOURCES:

Missouri Commission on Higher Education
600 Clark Avenue
Jefferson City, Missouri 65101

MONTANA

Montana recently adopted an extensive regulatory scheme for post-secondary educational institutions. [75-9201, R.C.M. 1947] It prohibits the operation of a school in the state, and acting as an agent for a school, without a license from the department of business regulation of which administers the act with the advice of the advisory council. Since the act is substantially modeled on the ECS model statute its provisions shall not be recited here.

Institutions accredited by a national or regional accrediting agency are exempt from the act when the accrediting agency is "r]ecognized by either the board of public education or the board of regents of higher education... (RCM 75-9203(1)).

Additionally, the department may accept accreditation by an accrediting agency recognized by the United States Office of Education as sufficient to establish compliance with the minimum standards of the act; this exemption would not, however, extend to all the requirements of the act (banding, contractual restrictions, etc). (RCM 75-9207(c)(2)).

Montana also has an older statute which requires the regent's approval for degrees. (RCM 1947, §75-8502). Schools "[a]ccredited by an educational accrediting association whose accrediting is found by the regents to be generally recognized by state and other universities in the United States" are not required to procure this approval.

SOURCES:

Department of Business Regulation
Capital
Helena, Montana 59601

NEBRASKA

Nebraska requires individuals who wish to establish a private college to procure the approval of the State Board of Education (79-2401). The Board considers the following factors in reaching its decision:

"(1) The need for and the objectives of the proposed college;

(2) The proposed instructional program and the plan for staffing such a program, including staff qualifications;

(3) The financial soundness and capability to fulfill its proposed commitments; and

(4) Such other pertinent factors as relate to the potential of the proposed college or as may be developed at the hearing." (79-2404)

The State Board may also provisionally accredit schools which have not been accredited by a regional accrediting association, following recommendation by a special committee of representatives of the accredited schools of the State. The criteria to be relied upon by the Commission have the potential for obstruction of an external degree program, as does the very makeup of the committee. The criteria are:

"(a) The instructional program of the college, which must be similar in quality and content to that offered in accredited public and private colleges within the state;

(b) The educational and experience qualifications of the administrative and instructional staff must be adequate to fulfill the purposes of the college;

(c) The physical plant, including provisions for housing and student services, and the instructional equipment of the college must be adequate to carry out the educational program;

(d) The college must be financially sound and capable of carrying out its commitments; and

(e) It must be the intent of the college to become accredited by a regional accrediting association and any necessary action to obtain such accreditation must have been taken;...." (79-2407(2)a-e), (79-2407)

In addition, Nebraska licenses privately-owned correspondence, business and trade schools (79-1809, et seq.).

Comment:

Foreign accredited schools have entered the State without challenge (conversation with Gerald Sughroue, Administrator, Professional Education and Field Services).

SOURCES:

State Board of Education
233 South 10th Street
Lincoln, Nebraska 68508

79-2401 through 79-2407

NEVADA

Nevada licenses private schools, colleges and universities which operate in the State (NRS 394.010 through 394.190) and private correspondence, business and trade schools which operate in the State (394.200 through 394.420). The former act contains no exemption for accredited schools, but the exemption contained in the second act (394.200(f)) is interpreted to exempt them from the former act.

The private schools, college and university act contains requirements that the applicant produce a copy of the institution's brochure, and meet standards in the area of financial stability, course offerings

> "[c]redits earned in a private school shall be sufficient to enable enrolled students to transfer to a comparable educational institution which is regionally or nationally accredited without loss of value, either during the time of enrollment or at completion of enrollment."

Regulations for Private Kindergarten, Elementary and Secondary Schools, Colleges and Universities, section D(1)), facilities, personnel, operating practices and publications. Additionally, courses must be taught in English, unless the subject of the course is a foreign language (NRS 394.140), and a minimum of one year of instruction in constitutional principles and history must be given (NRS 394.150).

SOURCES:

NRS 394.010 through 394.420
Regulations for licensing and Operation at Private Schools.

Letter from Kenneth H. Hansen, Superintendent
Public Instruction

NEW HAMPSHIRE

New Hampshire regulates educational institutions at the time of their incorporation, by requiring the consent of the Coordinating Board of Advanced Education and Accreditation to incorporation (292:8-d). The use of collegiate names (292:8-g) and the granting of degrees are also regulated (292:8-h).

Foreign schools establishing branches, of offering courses in New Hampshire must apply to the above Board for evaluation and accreditation. NH 186:13-6). The Board may accept accreditation by a recognized regional or national accrediting association in lieu of an independent evaluation (186:13-a(iv)) and will ordinarily do so (Procedure-Laws and Procedures Relating to the Establishment and Evaluation of Institutions of Higher Education in New Hampshire, telephone conversation with Arthur Jensen on 6/6/74).

SOURCES:

Arthur E. Jenson, Executive Director
RSA 292:1, et seq.
RSA 186.13-a et seq.
Laws and Procedures Relating to the Establishment and Evaluation of Institutions of Higher Education in New Hampshire.

Coordinating Board of Advanced Education and Accreditation
66 South Street
Concord, New Hampshire 03301
603/271-2555

NEW JERSEY

New Jersey has a special incorporation act for "private schools", NJSA 15:11-9 through NJSA 15:11-15, which states the requirements for the certificate of incorporation, the corporate powers [granting degrees is not among them], and provisions for trustees. This act is restricted to corporations not organized for pecuniary profit, nor holding capital stock (NJSA 15:11-15).

Before an educational corporation can furnish instruction leading to the grade of a degree, or grant a degree, it must submit its articles of incorporation to the Board of Higher Education, and obtain a license from them (NJSA 18A:68-3). Before admitting any person to the grade of a degree, the corporation must submit "the basis or conditions thereof to the board of higher education" and obtain its approval (NJSA 18A:68-6).

The Board has determined that institutions

> "[l]egally operating in another state that wishes to establish a branch or branches, or to offer courses, in New Jersey, shall apply in the same manner for a license to operate and for degree-granting approval, and shall be judged by the same standards as constitutions applying for initial licensure in New Jersey." (New Jersey Department of Higher Education, Regulations and Standards for New Jersey Institutions of Higher Education, p. 16).

The regulations promulgated pursuant to the statute require a statement of purpose, organizational and administrative features; finances; the educational program; summer, evening and extension work; faculty; the library; students and student services; physical facilities; and official publications (Id at 5-16). The regulations are generally non-quantitative. The reason for this was stated by the board to be:

> "[b]ecause of changes in peer group emphasis on the details of good management and in order to permit flexibility on the part of the State when administering the regulations (and on the part of institutions governed by the regulations), where appropriate, the regulations shall use language such as "adequate," suitable," proper," desirable," etc. to describe the end sought." (Id at 2).

It is difficult to tell what the effect of these regulations on innovative education will be because of their lack of specificity, and their apparent lack of attention towards innovative education.

SOURCES:

NJSA, sections 18A:67-1, 18A:67-2
NJSA, sections 18A:68-1, et. seq.

New Jersey Department of Higher Education, Regulations and Standards for New Jersey Institutions of Higher Education (1972)

State Board of Higher Education
Trenton, NJ

NEW MEXICO

New Mexico has a "State Domiciled Proprietary School Act" (NMSA 73-40-1, et. seq.) and an Out-of-State Proprietary School Act" (NMSA 73-41-1, et seq.) which are consumer protection statutes providing for the supervision of proprietary schools. Both Acts exempt schools and courses "[a]ccredited by an educational institution accredited by an applicable national or regional accrediting agency recognized by the United States Office of Education of the Department of Health, Education and Welfare" (NMSA 73-40-4(H) & 73-41-3(c)). Thus, there is no regulation of foreign accredited institutions.

SOURCES:

State Board of Education

Statutes:

N.M.S.A. 73-40-4 through 73-40-10
N.M.S.A. 73-41-1 through 73-41-9

NEW YORK

The New York regulatory scheme for higher education is far-reaching and complicated. Out-of-state schools receive specific attention in the statute, and their treatment will be described as part of the overall regulatory scheme.

An educational corporation formed under the laws of another state must procure authority to conduct activities in New York from the Regents, or from the Commissioner of Education. [Ed. Law §216-a(3)] The alternatives are determined by the nature of the program; authority from the Regents is required when "formal credit" is offered, authority from the Commissioner sufficies when the operation is "education in an informal way". [Letter of July 22, 1974 from Dr. Alvin P. Lierheimer, Associate Commissioner for Academic Development, the State Education Department, The University of the State of New York.]

An applications shall be submitted to the Regents for their approval on forms prescribed by the department, setting forth evidence of educational quality and resources equivalent to that of New York institutions of higher education offering similar programs, as determined by the commissioner. Such application shall include evidence, satisfactory to the commissioner, of the need for the proposed program or programs, and that the long-range plan for the program is in accordance with the Regents Statewide plan for the development of postsecondary education.

A proposed program must be registered with the department. Registration of a proposed program shall be accomplished in accordance with the provisions of Part 52 of the regulations of the commissioner.

The other major statutory provision prohibits degree-granting, and the use of collegiate names without the consent of the Regents (Ed. Law §224(1)) It also contains a prohibition against offering or advertising college degrees when the institution is not listed by the Office of Education of H.E.W. unless the program is registered with the department of education (Ed. Law §224 (3)).

The Regulations elaborate on the requirements of these statutes. Schools "authorized to confer degrees or offer courses of study at the higher education level in a state other than New York" which desire the Regent's permission to offer educational programs in New York must do the following:

> Section 3.56 of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York. The first standard-that the quality be equivalent to that of New York institutions-is satisfied by regional accreditation. (letter from Dr. Lierheimer, supra.; Guidelines for Out-of-State Institutions Operating Educational Programs in New York State, State Education Department, University of the State of New York, September 1, 1972).

The requirement that an institution demonstrate a "need" for the proposed program is not further explained in the Regulations.

Schools must also present evidence of conformity with the Regent's statewide plan for the development of postsecondary education. The Regent's statewide plan is described in Ed. Law §237 as the product of long-range master plans filed by state university trustees, the board of higher education of the city of New York, and all private higher education institutions in the state. The Regents must approve those plans relating to public institutions, and then incorporate the plans into their own plan. Hearings are conducted on the plan, which is then submitted to the governor and legislature, to become effective on the governor's approval. (Ed. Law §237). Although the Regents plan does include consideration of the "need for additional educational facilities in a particular area" a showing of conformity with the plan is not identical with a showing of "need". Dr. Lierheimer explained the relationship:

> "Although there is a relationship between the concept of "need" and the Regents statewide plan, the former is quite specific in that it relates to a program of discipline whereas the latter is more broad in that it addresses major areas of concern". (letter from Dr. Lierheimer, supra)

This regulation also requires that these foreign schools be registered with the department. The registration provisions consist of an extensive examination of particular curricula of an institution (8 NYCRR §52) Need and conformity with the Statewide Plan and again in issue. (8NYCRR §52.1(b))

The standards applied to the curricula are in the area of physical resources, administrative policies, faculty, admissions, curricula, degrees, and summer, evening and extension curricula. Some of these standards are quite specific, although there are indications that flexibility is contemplated. The faculty standards present an example of this:

> "In all divisions of the faculty a majority of the faculty shall be full time, except when the nature of the educational program and the expertise it requires justify a departure from the rule.
>
> In senior colleges and universities, except where other standards pertain, at least one faculty member in each instructional program must hold the doctorate in the appropriate field. Each member of the instructional staff is expected to be actively engaged in study of his professional interests. To be appointed to the graduate faculty, a scholar shall have achieved the doctoral degree or have demonstrated, in other widely recognized ways, his special competence in the field in which he directs graduate students." 8 NYCRR 52.1 (c)(1)and (3)

An alternative route for a school wishing to operate in New York would be to incorporate in New York. Incorporation of an educational corporation is governed by Ed. Law §216 and §218. The latter statute states that schools must have resources of $500,000 minimum unencumbered assets. The Regents state that a more realistic number would be four to five million dollars for a school in the New York City area. (Procedures for the Acquisition of Charter Powers, Bureau of College Education, State Education Department).

Although the incorporation statute itself doesn't contain a "need" requirement, once incorporated the school will have to register its curricula, then satisfying that requirement. For that reason the Regents have "recommended that academic plans be worked out in concert with the Division of Higher Education prior to the official submission of a petition to the Board of Regents." (Ed.)

SOURCES:

Ed. Law §216 through §224
Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York
Procedures for the Acquisition of Charter Power, Bureau of College Evaluation, State Education Department

Letter of July 22, 1974 from Dr. Alvin D. Lierheimer, Associate Commissioner for Academic Development, the State Education Department, the University of the State of New York

CONTACT:

The State Education Department
The University of the State of New York
99 Washington Avenue
Albany, New York 12210

NORTH CAROLINA

The Board of Governors of the University of North Carolina has authority over degree-granting by non-public educational institutional institution which are "created or established" in the state (§116-15(a)) the statute contains a licensing requirement; the Board has authority to promulgate regulations pursuant to it. Although the language of the statute is ambiguous, it would appear that the statute does not give the Board authority over foreign schools operating in the state. The draft standards do not address the issue of foreign schools. (Draft, 10/10/73, Rules and Standards Relating to the Issuance of Licenses to Confer Degrees by the Board of Governors of the University of North Carolina).

SOURCES:

N.C. §116-15 (1973 Comm. Supp.)
Business Trade and Correspondence Schools: N.C. §115-245 through §115-257 Draft, 10/10/73, Rules and Standards Relating to the Issuance of Licenses to Confer Degrees by the Board of Governors Of the University of North Carolina.

Contact

Harold Delaney
University of North Carolina
Office of Vice President
P.O. Box 2688
Chapel Hill, North Carolina 27514

NORTH DAKOTA

North Dakota has a licensing requirement for private trade, industrial, vocational, technical, business, and correspondence schools and their solicitors. Schools which are "regularly chartered and authorized by the laws of the state of North Dakota to grant degrees, [and] endowed schools which offer approved courses without profit" are excluded from the operation of this statute. The application of this statute to accredited, non-profit foreign institutions is unclear. Interestingly one of the licensing requirements is that "[s]chools domiciled or having their principle place of business outside of the state shall be required to be accredited by a recognized accrediting agency." "Accreditation" is also a requirement for a regular (Non-provisional) license for North Dakota domiciled schools. Since the type of "accreditation" required is unspecified it does not resolve the question whether regionally accredited, non-profit schools must be licensed.

SOURCES:

Statute: 15-50-01 through 15-50-03.
15-51-07 through 15-50-12.

Administered by the Board of Education at the City of Fargo - The Executive Offices.

OHIO

Ohio requires educational institutions (defined as institutions which offer instruction in recognized academic and professional disciplines and award degrees for at least four semesters, or six quarters, of work beyond high school) to obtain a Certificate of Authority from the Board of Regents before conferring degrees or using the name "college" or "university." (1713.01, 1713.02)

Although the statute gives the Board authority to adopt standards for the Certificate of Authorization, the Board has viewed the statute as a consumer protection statute and has relied on the standards and decisions of the regional accrediting agencies. There are a number of external degree programs operating in Ohio.

Ohio also has a comprehensive, private school act, which provides for the certification of proprietary schools. (Para. 3332.01, et seq.)

SOURCES:

Ohio Board of Regents
88 East Broad Street, Room 770
Columbus, Ohio 43215
Dr. James A. (Dolph) Norton, Chancellor

Letter of 11/21/73 from Glen Stine, Assistant to the Chancellor, Ohio Board of Regents

Educational Corporations, para. 1713.01, et. seq.
Certification of Private Schools, Para. 3332.01, et seq.

OKLAHOMA

The Oklahoma statutory scheme contains two types of requirements arguably applicable to foreign schools operating in Oklahoma. The first is a requirement that a school be accredited by the Oklahoma State Regents for Higher Education, unless it is accredited "by the regional accrediting agency" (O.S. Title 70 §4103 (1971)). The other restricts the degrees granted by a private educational institution to those authorized by the Regents, unless otherwise approved by the regional accrediting agency. (O.S. Title 70 §4103 (1971)) Additionally O.S. Title 70 §1922 states that colleges and universities wishing to grant degrees, or advertise degrees, must secure permission from the State Board of Education.) It is unclear when these degree requirements are applied to foreign schools. Apparently it is a matter of administrative discretion whether degrees are to be regarded as granted in Oklahoma, or in the state where the foreign school is domiciled.

SOURCES

O.S. Title 70 §1921 through §1925
O.S. Title 70 §4101 through §4105
O.S. Title 18 §574, §549

CONTACT:

Oklahoma State Regents for Higher Education
118 State Capital Building
Oklahoma City, Oklahoma 73105

Telephone conversation with Dr. Robert Vincent, Oklahoma State Regents

OREGON

Oregon requires any school that confers, or offers to confer, any degree to obtain approval from the State Board of Education which considers the recommendation of the Educational Coordinating Council. It exempts from this procedure schools which are accredited by the Northwest Association of Secondary and Higher Schools (but not those accredited by any other regional accrediting agency). To be eligible for approval, an institution must have " the full accreditation of its own professional accrediting association as recognized by the U.S. Office of Education," and a headquarters and staff in Oregon (Section 3, Administrative Rule 74-005: Application Procedures and Standards for Approving Institutions for Degree Granting Authority). The standards are generally non-quantitative (with the exception of the requirement that 75% of the staff be full-time employees) but appear to admit of wide discretion in their application. For example, the curriculum and academic standard is: "General academic requirements shall be on the same level and of the same amount as that generally required by recognized standard institutions offering a similar program." (Section 5(e), *id*).

Comment:

Oregon has a very protective attitude towards its own schools, and has only allowed one out-of-state institution in the State (Nova U). Apparently, the need for the school is treated as a criterion, although no mention is made in the statutes or regulations of this standard.

SOURCES:

Oregon Board of Education
942 Lancaster Drive NE
Salem, Oregon

O.R.S. 351.710 to 351.760, and 351.990

PENNSYLVANIA

The requirements of the Secretary of Education are stringent. Under statute, a degree granting institution must have a minimum protective endowment of at least $500,000 beyond all indebtedness and assets invested in buildings and apparatus, for the exclusive purpose of promoting instruction. It must also have a faculty consisting of at least eight regular professors who devote all their time to a specific subject in art, archaeology, literature or science--at least three regular professors.

The standards prescribed by the Secretary of Education pursuant to 15 P.S. § 7211, "Special Procedure for Incorporation of Educational Institutions Desiring to Confer Degrees," must also be met.

The standards include:

1. Establishment of the extent of need for the institution through an extensive survey by use of techniques and procedures acceptable to the Secretary of Education;

2. The "university" must consist of three units, at the minimum:

   - One unit must provide for the study of the arts and sciences at the undergraduate level (institutions offering only graduate programs may be exempted from this level upon the special recommendation of the Secretary of Education.)

   - One unit must provide for advanced degree programs through the doctorate in the arts and sciences, with an adequate number of majors in the various disciplines.

   - One unit must provide for programs at the graduate level in such fields as architecture, business, administration, education, engineering, health sciences, law, and social work "but not limited to these." Plans to offer doctoral programs in the existing curriculum must be at least formulated.

   (In addition, a collegiate institution which seeks to be incorporated as a university "shall have had the status of regional accreditation as a college on the basis of initial accreditation and revisitation.")

3. The institution must submit a detailed statement of its philosophy The Statement of Goals must set forth what the institution regards as its long range mission and a statement of objectives must express specific means for accomplishing the mission.

4. The institutional Board of Trustees must have as its main function the legal operation of the institution.

5. "The administrative organization[must] reflect the relationships of constituent groups."

6. "Financial records [must] be maintained which are consistent with the record keeping systems of recognized quality institutions of higher education of a similar nature."

   "...Financial stability [must] be determined by the comparison of current funds expenditures accounts against current funds revenues accounts...over the five-year period prior to the request for university status. The institution shall provide a ten-year projection of available income expenditure which shall be based on the need and ability to support the institution by the chartering group."

7. The undergraduate college, or colleges of the institution must meet these standards prescribed for the undergraduate colleges

8. An academic year must consist of class sessions for a period of at least 30 full weeks or its equivalent, exclusive of registration, examinations and holidays.

9. "A private organization or corporation desiring approval for university status [must] submit a formal application to the Secretary of Education...prior to a visitation to the institution. This application shall be filed one year or longer in advance of the time when operation as a university is desired." (emphasis added).

SOURCES:

15 P.S. § 7312, Requirements of Educational Institutions Desiring to Confer Degrees.

Regulations of State Board of Education of Pennsylvania, Chapter 11 Higher Education, Section 11-400. Under 24 P.S. § 2422 and 15 P.S. § 7202, these same regulations must be met for use of the word "university" so as to imply that the institution has met the requirements.

RHODE ISLAND

Rhode Island has a private school act (16-40-1 through 16-40-15) which requires approval from the Regents prior to incorporation (16-40-1), the granting of degrees (16-40-4), advertising, soliciting, or conducting courses (Proprietary School, Standards for Approval, pg. 1) by any school doing business in the state (Id.).

The standards are not so much concerned with the substance of the educational program as with regulation of the school's nonacademic policies. The areas in which criteria must be met include: the moral character of the school's officers, the qualifications of the instructors, the school's admission, minimum progress and attendance, student conduct, tuition, and refund policies; instructional program data (The orientation of the act towards vocational education is clearly revealed in this area. One standard requires that "the courses, content and length of instruction shall be of such nature and quality as to assure reasonably that the students will adequately develop the job skills and knowledge necessary for obtaining employment in the occupation for which the instruction is offered".); advertising, equipment, financial stability (including a surety bond equal to not less than the minimum number of students times the average tuition and fees charged in advance); school plant and records.

SOURCES:

"Correspondence Schools, Home Study and Related Courses".

"Proprietary School. Standards for Approval."
Department of Education
Division of Regulatory Services
"Correspondence School" Standards for Approval for Solicitation.

Contact: School Approval Unit
Division of Regulatory Services
State Department of Education
199 Promenade Street
Providence, Rhode Island 02908

RI 16-40-1 through 16-40-15, "Private Schools."

SOUTH CAROLINA

South Carolina has a Proprietary School Act, which exempts "[p]rivate colleges and universities which award an associate, baccalaureate, or higher degree" (§21-750,1 (2) [illegible]). There are no other statutes applicable to higher education.

SOURCES:

South Carolina Department of Education
Columbia, SC

§21-750 through 21-750,11 (1973 Comm. Supp.)

SOUTH DAKOTA

South Dakota's regulation of private schools consists of an act which supplements the general law of fraud with regard to solicitation practices, and requires a permit for those who solicit for schools. (SDCL 1967 13-48-1 et seq.) The act does not attempt to regulate the quality of education offered. The Associate Commissioner of Higher Education stated in a letter to us that "South Dakota has no law affecting nonprofit institutions accredited in another state and no law on private institutions in our state" (letter of 11/14/73 from Francis B. Nickerson, Associate Commissioner of Higher Education).

SOURCES:

Solicitation of Students by Private Schools, 13-48-1 through 13-48-23, S.D.C.L., 1967.

Letter of 11/14/72 from Francis B. Nickerson, Assistant Commissioner of Higher Education to Project.

TENNESSEE

In 1974 Tennessee adopted a Postsecondary Education Authorization Act, which is substantively similar to the ECS model statute. Tennessee, however, chose to exempt from the provisions of the Act "degree-granting postsecondary educational institutions accredited as of July 1, 1974 by the Southern Association of Colleges and Schools or another regional accrediting agency which is a member of the Federation of Regional Accrediting Commissions of Higher Education." (9 T.C. 49-3904(p)(1974 Cumm. Supp.)).

Postsecondary Education Authorization Act: §49-3901 through §49-3925.

administered by:

Commission on Postsecondary Vocational Education Institutional Authorization (Interestingly, six members of the nine person commission are to be occupants of "executive or managerial positions in a postsecondary vocational education institution authorized and regulated by the commission.")

Contact: Tennessee Higher Education Commission
908 Andrew Jackson State Office Building
Nashville, Tennessee 37219

TEXAS

Texas has a proprietary school act (f.n.: for description of general pattern of this legislation see appendix_____) The act exempts "[p]rivate colleges or universities....

(TCA §§ 32.20 (6))

The Commissioner of the Coordinating Board of the Texas College and University System informed us that "[t]here is, at present, no statutory authority in this state for the regulation of non-profit institutions accredited in another state, offering, or planning to offer college or graduate level degrees or courses in Texas". (letter of 12/6/73 from Bevington Reed, Comm. of ....   ).

SOURCES: Texas Proprietary School Act, TCL §§ 32.01 through 32.81 (   ). letter of 12/6/73 from Bevington Reed, Commissioner, Coordinating Board of the Texas College and University System.

State Board of Education
Division of Proprietary Schools and Veterans Education
Texas Education Agency
Austin, Texas 78701

UTAH

Utah has no legislation regarding higher education. The Coordinator of Veterans and Vocational-Technical Affairs informed us that liaison with the private education sector is maintained by the state agency in their role as state approval agency for federal programs. (Letter of 11/19/73, from Coordinator of Veterans and Vocational-Technical Affairs, Utah System of Higher Education). The agency apparently informally engages in an assessment of the need for educational programs:

> "In the absence of state legislation which allows for the governance of private schools at any level, as well as formal Board of Higher Education policies, our efforts endeavor -- where appropriate -- to consider the impact which their education programs may have upon corresponding offerings in public schools."

SOURCES:

Letter of 11/19/73, etc. from Sterling R. Provost to Project

Contact: Utah System of Higher Education
136 East South Temple
Salt Lake City, Utah 84111

VERMONT

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Vermont conditions incorporation on the successful procurement of a certificate from the state board of education which acts on the advice of the Vermont higher education council. (16 VSA §174 a) Incorporation in this manner as a nonprofit educational corporation is required before a degree can be granted, or a collegiate name used. (16 VSA §174 (b) and (c)). The act exempts from these restrictions institutions of "[h]igher education operating in Vermont but chartered in another state and accredited by the state applicable regional accrediting agency recognized by the state board provided, however, that articles of association of the corporation are filed according to the laws of this state. (16 VSA §174 (e))

Additionally, correspondence and trade school representatives must be licensed (16 VSA §§2751 through 2760).

SOURCES:

16 VSA §174
16 VSA §§2751 through 2760

George V. Kidder
Executive Secretary
Vermont Higher Education Council
The University of Vermont
Burlington, VT 05401

VIRGINIA

Virginia exercises extensive regulatory powers over its schools, based on statutes which forbid the use of collegiate names or the granting of degree, without the authority of the State Council of Higher Education [23-8.1, 23-9 (1973)] The regulations promulgated for four-year and junior colleges under these statutes cover the major aspects of institutional concern (purpose, organization and administration, educational program, financial resources, faculty, library, student personnel, physical plant, and special activities). Although most of the standards are suggestive, indicating "some of the questions which might be asked with regard to the evaluation of institutional structure and function" (State Council of Higher Education for Virginia, Standards for Four-Term Colleges, September 1970,).

Others are mandatory. Among those which could hinder development of external degree programs are requirements that the annual expenditure per student "[m]eet the minimum prescribed by the Southern Association of Colleges and Schools in their Standards of the College Delegate Assembly dated December 3, 1969" and requirements that specified proportions of faculty members meet certain degree levels (id) Standards for graduate programs are binding, and require among other things accreditation of the undergraduate program by the regional accrediting agency, or a specialized agency recognized by the National Commission on Accrediting; academic policy formulation by the faculty; specific hour requirements for the masters and doctoral degrees, (including a thesis and residency requirement for the latter); minimum financial expenditures (State Council of Higher Education for Virginia, Standards for Graduate Programs).

Virginia has also adopted a statute which encourages the establishment of regional consortium of public and private universities. Within these consortia, a state-supported institution is to "[d]evelop nontraditional degree programs at the baccalaureate and master's level which have minimum residency requirements and maximum transferability of credit from any accredited institution." (s23-9.10 (a) 1974 Cum. Supp.)

This statute evidences a legislative approval of innovation, which may be reflected in the application of the standards discussed above.

SOURCE:

State Council of Higher Education for Virginia
10th Floor
911 East Broad Street
Richmond, VA 23219

WASHINGTON

The State of Washington has no legislative authority over private colleges. There is a Council on Higher Education, which was established to study and plan for the educational needs of the state (28B.80.010 et seq.).

SOURCES: [illegible]

Stat: 28 B.80.101 through 28 B.80.910

Council on Higher Education
State of Washington
908 East Fifth Street
Olympia, Washington 98504

WEST VIRGINIA

West Virginia statutory provisions regarding higher education are sparse. There is a permit requirement for schools which are selling instructions within the state, but the requirement only applies to correspondence, business, occupational and trade schools, and it exempts schools that are members of nationally recognized accrediting associations approved by the West Virginia Board of Education. (W.Va. §18-2-10).

Additionally, the West Virginia board of regents has authority under §18-26-13(a) to accredit schools, and determine the minimum standards for the conferring of degrees. It is unclear from the statute whether it is applied to foreign schools. The Chancellor of the Board of Regents did not respond to questions on this subject.

SOURCES:

§18-2-10
§18-26-13a

CONTACT

Mr. Prince B. Woodard
Chancellor
West Virginia Board of Regents
1316 Charleston National Plaza
Charleston, West Virginia 25301

WISCONSIN

The Wisconsin incorporation statute empowers educational corporations to grant degrees (section 182.028). Additionally, an educational approval board is empowered to regulate the quality of instruction, facilities and sales practices of proprietary schools (Wisc. Stat. Ann., section 38.51 (Supp. 1973)) "Schools organized on a nonprofit basis as defined by the U.S. Internal Revenue Code," and "Schools accredited by accrediting agencies recognized by the board" are excused from the act (except that the board retains authority to approve these schools for veteran's training, and other programs) (section 38.51 (3)(a) (Supp. 1973)).

SOURCES:

Wisconsin Statute Ann.

Section 182.028
Section 38.51 (Supp. 1973)

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WYOMING

Wyoming requires a license of all "trade, correspondence, technical, vocational, business or other nonparochial private schools" which do business, or solicit students in the state, regardless of the state of their principal place of business (21.1-191). The statute contains no exemption for accredited, or nonprofit or nonvocational schools. To obtain a license a school must achieve with minimum standards which require such things as; adequate facilities for the training offered; "adequate educational qualifications and work experience as a wage earner in the subject area of thier responsibility" on the part of the directors, administrators and instructors, financial soundness; non-misleading advertising; compliance with state codes; and a reasonable refund schedule (which is specified). [Rules and Regulations §3 1972, Wyoming Private School Licensing State Board of Education]

The regulations further specify that:

> "(h) The subjects, courses, curriculum and instruction shall be consistent in length, intensity and educational quality necessary to reach professed or proclaimed objectives of that particular course.
>
> (i) The courses and curriculum shall be organized on a systematic basis and when applicable shall include classrooms, fields, shops, laboratory or work experience training.
>
> (j) The subjects, courses and curriculum shall be designed to increase the skill, knowledge, occupational information and understanding of the students."

(Id § 5)

Additionally, a $10,000 performance bond is required. The statute does not give degree-granting powers, and states that licenses may be revoked if a school confers a degree which is not recognized by an accrediting agency approved by the State Department.

(Id §6)

This licensing scheme is comprehensive and far-ranging. No consideration is given to innovative programs, and indeed the entire tenor of the Rules and Regulations indicates a concentration on vocational schools. Interpreted unsympathetically the Act could certainly have an adverse affect on innovative programs by virtue of the wide discretion granted the administrators.

SOURCE:

Wyoming Code §21.1-191 through §21.1-197.

Rules and Regulations, 1972, Wyoming Private School Licensing,
State Board of Education

CONTACT:

Wyoming School Board of Education
State Capital Building
Cheyenne, Wyoming 82001

Appendix B

INCORPORATION AND CHARTER REQUIREMENTS FOR NON-PROFIT INSTITUTIONS OF HIGHER EDUCATION

SOURCES: Review of Statutory Material
Letter Survey to State Education Agencies
"Legal Bases For Establishment and Regulation of Private Institutions and Corporations-Part I," Higher Education In The States, Education Commission of the States, May-June, 1972.

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	
Alabama Code of Alabama Title 10, Art. 3-4, Sec. 124-138 (1959), Vol.4)	Routine	N.P.	Educational Corporation	N.P.	
Alaska Alaska Statutes, Title 14, Sec. 14.47.010-14. 47.140 (1966)	Routine (approved by Commissioner of Commerce	N.P.	N.P.	N.A.	
Arizona Arizona Revised Statutes Annotated Sec. 10-451-10-456 Vol. 3(1956)	Routine	N.P.	N.P.	N.P.	
Arkansas Arkansas Statutes Annotated, Sec. 64-1401-64-1415, Vol.6 (1966 Replacement)	Chartered by State Board of Education	N.P.	N.A.	N.A.	Restr degre
California West's Annotated California Code, Vol. 28-A, Sec. 29001-29007 (1960)	Routine Incorporation Special statute for institutions offering education beyond high school and conferring a diploma or degree.	N.P. except Column (5)	Educational Corporation such as junior colleges, colleges, universities, specialized educational institutions.	N.A.	Degree region exempt ments.
Colorado Colorado Revised Statutes, Chap. 31, Art. 20, Sec. 31-20-1-31-20-7 (Vol. 2, 1963, Art. 20-1 revised 1967)	Routine Non-profit incorporations	N.P.	N.P.	N.P.	

3 TYPES	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
l Corporation	N.P.	N.P.		
N.P.	N.A.	N.P.	N.P.	
N.P.	N.P.	N.P.	N.P.	
N.A.	N.A.	Restricts honorary degrees only.	Must meet standards of similar institutions	
al Corporation such colleges, colleges, ies, specialized al institutions.	N.A.	Degrees awarded if regionally accredited-exempt from other requirements.	Degrees approved by superintendent of Public Instructions or Regional accreditation.	
N.P.	N.P.	N.P.	Exempt if-Public institutions; eleemosynary schools; employee only courses; private colleges and universities offering degrees and a majority of whose credits are transferable to a Colorado public institution.	

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	
7. Connecticut Connecticut General Statutes Annotated, Vol. 5A, Sec. 10-330 10-331, 1967 (Sec. 10-330(d) amended 1968)	Routine-N.P.	Licensed by Commissioner Higher Education. Will accept regional or national accreditation where appropriate.	College or university credit	Junior college, or university or any other term cannot be used unless licensed.	No d unle miss
8. Delaware Delaware Code, Title 8, General Corporation Law, as amended by Senate Bill 123, 1967 Laws.	Routine Incorporation	N.P.	N.P.	N.P.	
9. Florida Florida Statutes, Chap. 246, Sec. 246. 011-246.141 (1971, amended in House Bill 3117, 1972)	Routine Non-profit Corporation	After June 1, 1972, non-public colleges must be licensed by the State Board of Independent Colleges and Universities. Annual Reports required.	Non-public institute, college, university, junior college, or entity furnishing a degree or instruction leading to a post-secondary degree or diploma-applies to in person or by correspondence study. Public institutions; accredited colleges; employee related classes; labor union courses are exempt.	Titles "College" or university" restricts to degree-granting institutions licensed by State Board.	See
10. Georgia Georgia Code annotated, 1968 special supplement, Title 22, Sec. 22-2201-22-2702; 22-3301. Sec.32-415, 1952,Book 11.	Requirements of State Board of Education must be met before charter is granted.	N.P.	Universities, colleges normal or professional schools.	N.P.	Degr ferr grant

	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
university	Junior college, or university or any other term cannot be used unless licensed.	No degrees can be granted unless approved by commission under Column (2).	Commission for Higher Education established regulations for requirements.	
	N.P.	N.P.	N.P.	
nstitute, versity, ge, or shing a struction post- gree or les to by ce study. tutions; olleges; ated classes; courses are	Titles "College" or university" restricts to degree-granting institutions licensed by State Board.	See Column (4)	State Board administers standards.	
colleges ofessional	N.P.	Degrees cannot be conferred until charter is granted.	State Board prescribes standards.	

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES
4. Utah Utah Code Annotated, Title 16, Chap.6, Sec. 16-6-18-16-6-111 (Vol.2, 1967 Pocket Supplement)	Routine	N.P.	N.P.	N.P.
5. Vermont Vermont Statutes Annotated, Title 11, Sec. 101 (Vol. 3, 1958). Title 16, Sec.148 (Vol. 5, 1968 Cumulative Pocket Supplement.	Articles of Incorporation of corporations engaging in higher education must be accompanied by a certificate of approval of the State Board of Education.		N.P.	Use of title descriptive of college or university prohibited unless incorporated under Col.1.
6. Virginia Code of Va. Title 2, Sec. 13.1-201-13.1-234; Title 23, Sec. 23.9 (Vol. 3, 1964. Vol.5 1968 Cumulative Supplement)	Routine Incorporation	N.P.	N.P.	N.P.
7. Washington Revised Code of Washington, Title 24, Chap.235, Sec. 24.03.005-24.03.910 (1967 Supplement)	Routine	N.P.	N.P.	N.P.
8. West Virginia West Virginia Code, Chap.35, Sec.35-2-4; 35-2-6 (Vol. 11, 1966); Chap. 18, Sec. 18-26-13a (1971)	See Column 2	Board of Regents will not grant charter until approved.	All colleges, universities, and other institutions of higher education in state.	N.P.

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	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES
11. Hawaii Revised Laws of Hawaii, Title 23, Sec. 172-1-172-23. (1955, Vol II, revised, 1965 supplement, pp. 794-803.	Routine Incorporation	N.P.	N.P	N.P.
12. Idaho Idaho Code, Chap. 39, Sec.33-3901-33-3910, Vol.6-A, 1963 (revised Sec. 33-3903, 1967 Cumulative Pocket Supplement)	Routine Incorporation 5 or more required to incorporate.	N.P.	College, seminary, or other institution of learning.	N.P.
13. Illinois Smith-Hurd Illinois Annotated Statutes, Chap. 144, Sec.1-17, 231-242, 1964.	Routine Incorporation	N.P.	Any university, college, academy, or other institution of learning must be approved by Supt. of Public Instruction.	N.P.
14. Indiana Burn's Indiana Statutes, Chap. 32, Sec. 25-3201-25-3245 (1960)	Routine Incorporation-institution of higher learning.	After July 1, 1972, private schools can't do business unless accredited. (Not clear whether applies to -------	High School, College, University Private colleges and private proprietaries.	N.P.
15. Iowa Iowa Code Annotated Chap. 504, Sec. 504-1-504.25 (1949; amended in 1968 Cumulative Pocket Part, Vol. 28)	Routine Non-profit Corporation	N.P.	Colleges, etc.	N.P.
16. Kansas Kansas Annotated Statutes, Vol. 2, Art. 14, Sec. 17-1401-17-1407, 1964	Routine Non-profit Corporation	N.P.	College, University	N.P.

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	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
	N.P.	N.P.	N.P.	
r other ning.	N.P.	N.P.	N.A.	
ege, sti- ust be Public	N.P.	Approval of Supt. of Public Instruction.	Advisory Council on Degree Granting Institutions which approves rules issued by Supt. of Public Instruction.	Out-of-state and foreign corporation, institutions in state must be approved by Supt. of Public Instruction.
, Uni-	N.P.	N.A.	State-aided institutions exempt. Indiana private school accred-ing Commission Minimum standards in statute.	Accreditation issued by another state will be accepted.
pri-	N.P.	Any corporation of an academic nature may confer degrees usually conferred by such an institution.	N.P.	Minimum of one academic year of resident work required by recipients before academic degree may be awarded.
	N.P.	N.A.	N.A.	

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	
7. Kentucky Kentucky Revised Statutes, Vol. II, Chap. 273, Sec. 273.070,273.080,273.161-273.273 (1968 Supplement) Senate Bill 315 (Enacted, effective June 16, 1972)	Routine Incorporation	All colleges must hold licenses from Supt. of Public Instructions.	Institutes, junior college, college, university, or entity awarding a degree or diploma.	Use of title "college" or "university" restricted to institutions licensed under Act.	
8. Louisiana Louisiana Revised Statutes, Vol. 13 and 13A, Sec. 17:2051-2052;17:411; 17:20 (1963)	State Board must approve before offering degrees	State Board of Education has authority to approve private schools and colleges.	Private schools and colleges.	N.P.	Boa tut
9. Maine Maine Revised Statutes Annotated, 1968-69 Cumulative Pocket Supplement, Vol. 11, Chap. 301, Sec.20:2202-20:2204.	Routine	Licensed by legislative Act on Recommendation of State Board of Education.	Any postsecondary institution.	Use of "junior college", "college" or "university" or any other title tending to designate it has power to confer degrees prohibited under licensed (col.2)	No shi cor any les by
0. Maryland Annotated Code of Maryland, Art,77, Chap.3, Sec.25 (b-e), 25A; Chap. 32-33, Sec. 305-314 (Vol. 7, 1965); 1967 Cumulative Supplement, Sec. 25(a)	Routine	After 1/4/48, private institutions must secure a certificate of approval from state Supt. of Education before it may continue or began to operate in state. See Column (7).	Any private institution offering a degree.	N.P.	Deg only inst wait

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	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
	N.P.			
	N.P.			
of academic ns.	N.P.	N.A.	Board of Higher Education enforces standard.	

---

	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
lege, r ee	Use of title "college" or "university" restricted to institutions licensed under Act.	N.P.	State Board of Education in recommendation of the Council on Public Higher Education adopts standards and procedures for licensing colleges.	Faculty-curriculum facilities-standards in statute.
	N.P.	Boards of Approved Institutions can offer degrees.	State Board of Education has power to give advice on all questions related to laws and management of education.	State Board must authorize out-of-state institutions.
	Use of "junior college", "college" or "university" or any other title tending to designate it has power to confer degrees prohibited under licensed (col.2)	No person, partnership, institution, or corporation shall confer any type of degree unless expressly authorized by legislative act.	State Board of Education establish standards for regulations and licensed.-Higher Education Council advises.	Institutions prior to 1/1/57, exempt.-Record depositing with State Depart. of Education.
	N.P.	Degrees may be offered only by degree-granting institutions-one-year waiting period.	State Supt. of Education issued rules and regulations and approves.	National or Regional accreditation accepted in lieu of written notices for approval. Accredited institutions State Records deposited.

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES
21. Massachusetts General Laws of Massachusetts, Chap. 69, Sec.30-31; Chap.266, Sec.89 (1965)	Prior to incorporation approval must be secured from the Board of Higher Education.	Board of Higher Education makes periodic inspections.	College, junior college, university.	No proposed institution located within the state shall award degrees unless authorized to do so by the state.
22. Michigan Michigan Compiled Laws, Annotated; Chap.450, Sec. 450 170-450.177 (Vol.25,1967)	State Board must approve in written statement before corporation is authorized to file articles of incorporation.	All private trade schools and institutes licensed by state board.	Very broad. Any post-secondary institution conferring degrees or honors.	Title of "college" or "university" limited to corporations complying with capital requirements.
23. Minnesota Minnesota Statutes Annotated, Chap.317 Sec.317.01-317.69 (1967 Cumulative Annual Pocket Part, Vol.20)	Routine	N.P.	N.P.	N.P.
24. Mississippi Mississippi Code Annotated, Title 21, Sec.5310.1, 5319-5324 (1966 Cumulative Supplement, Vol. 4A), Title 24, Art. 13, Sec.6791.5 (1966 Cumulative Supplement, Vol.5)	Routine except that Attorney General must approve prior to incorporation.	Attorney General may investigate before issuance of non-profit charters.	Junior and senior colleges and universities.	N.P.
25. Missouri Vernon's Annotated Missouri Statute Title 23, Sec.352, 010; 352.020; 355. 025-355.090 (Vol. 17A,1966)	Routine	N.P.	School, college, institutes, academy.	N.P.

4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
No proposed institution located within the state shall award degrees unless authorized to do so by the state.	No educational institution located within the state shall award degrees unless authorized to do so by the state.	Board of Higher Education established standards relative to facilities, physical plant, and leadership.	
Title of "college" or "university" limited to corporations complying with capital requirements.	No educational corporation may expand its purpose beyond that specified in articles of incorporation without prior approval from State Board.	State Board must approve prior to incorporation.	Educational corporations must meet capital requirements (1) not less than $500,000 or (2) capital of 1 million or more with 50% paid in.
N.P.	N.P.	N.P.	Every incorporated college is subject to an examination by Commissioner of Education and must submit an annual report to Commissioner.
N.P.	Must be approved by Commission.	Commission or college accreditation shall prepare a list of approved institutions and adopt standards for accreditation.	Out-of-state corporations must maintain an office for a resident agent.
N.P.	N.P.	N.P.	

		INCORPORATION CHARTERING	LICENSING	TYPES	RESTRICTION TITLES
26.	Montana Revised Code of Montana, Vol. 4 Part 2, Sec. 75-108, (1962 Replacement) Vol. 2, Part 1, Chap. 23, Sec. 15-2301-15-2397 (1967 Replacement)	Routine Incorporation	N.P.	N.P.	N.P.
27.	Nebraska Revised Statutes of Nebraska, Sec. 21-1901-21-1906 (Reissue of 1962, Vol. 1A), Art.24, Sec.79-2401,79-2407	In order to establish a two or four year private college sponsor must petition State Board of Education for approval.	State may provisionally accredit a private college not accredited by any regional.	Two and four year institutions.	N.P.
28.	Nevada Nevada Revised Statutes, Vol.3, Sec. 81-290-81.340(1967)	Routine	License required from State Board of Education	School, college, or university offering instructions to 5 or more at all times.	N.P.
29.	New Hampshire New Hampshire Revised Statutes Annotated, Sec. 292:8b-292:8k (1966 Replacement, Vol. 2B; 1967 Supplement, Vol. 2B).	Articles must be approved by Attorney General and by Coordinating Board of Advanced Education and Accreditation.	N.P.	Higher Learning education toward a degree.	Restriction on terms "college" or "university" or any title suggesting higher education unless incorporated under terms of statute.

	RESTRICTION TITLES	DEGREES	STANDARDS/RULES AND REGULATIONS	COMMENTS
	N.P.	No institution shall award a degree without approval of State Board of Education.	State Board of Education shall establish standards for courses and programs for which a degree is to be offered.	Any institution accredited by a recognized accrediting agency is exempted.
	N.P.	N.P.	State Board promulgates standards for establishment of private colleges.	Financial soundness and capability to fulfill commitments must be required before establishment.
nstruc- all	N.P.	Approval by State Board of Education.	State Board sets standards and maintains list of licensed schools.	Qualified exception for accredited institutions.
tion	Restriction on terms "college" or "university" or any title suggesting higher education unless incorporated under terms of statute.	No educational institution within state may grant degrees unless authorized by legislative act.	Standards establised by coordinators Board of Advanced Education and Accreditation.	Adequacy of financial resources.

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	
30. New Jersey New Jersey Statutes Annotated, Title 15: Sec. 15:11-9-15: 11-15 (1939; 1967 Cumulative Annual Pocket Part); Title 18A: Sec. 18A:67-1-18A:68-13(1968)	Private schools incorporate under separate educational statute-otherwise routine.	To award degrees must receive license from Board of Higher Education.		Restriction use of "college" or "university" without approval of Board of Higher Education.	Any subj stat
31. New Mexico New Mexico Statutes Annotated, Art. 14, Sec.51-14-20-51-14-40. (Vol. 8, Part 1, 1953; 1967 Pocket Supplement)	Routine	N.P.	N.P.	N.P.	All and auth and
32. New York McKinney's Consolidated Laws of New York, Annotated, Title 1, Art.5, Sec. 201-226 (1953), Book 16, Part 1; 1968 Cumulative Annual Pocket Part).	No corporation may establish or maintain any educational institution or work without consent of Regents-may not be incorporated without consent of Commissioner of Education.	N.P. (See Col. 5)	All secondary and higher education institutions regulated by Board of Regents.	Only chartered degree-granting institutions may use title of "college" or "university" without permission from Regents.	No i fer autho gree- rived
33. North Carolina General Statutes of North Carolina, Chap. 55A, Sec. 55A-1-55 A-88 (1965, Vol. 2B; 1967 Cumulative Supplement), Chap. 1244, Art. 1,Sec.116-15 (1971)	Routine	Licensed by Board of Governors.	N.P.	N.P.	Priv be li Gover degre

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	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
	Restriction use of "college" or "university" without approval of Board of Higher Education.	Any college may give degrees subject to provisions of statute.	Board of Higher Education Regulates names and standards for licensing.	
	N.P.	All colleges universities and institutions are authorized to grant diplomas and confer degrees, etc.	N.P. (Annual Report Required)	
and higher itutions oard of	Only chartered degree-granting institutions may use title of "college" or "university" without permission from Regents.	No institution shall confer degrees not specifically authorized by charter. Degree--ranting powers derived by Board of Regents.	Board of Regents	500,000 minimum capital.
	N.P.	Private institutions must be licensed by Board of Governor's before awarding degrees.	Board of Governors to establish licensing standards enforced by State Board of Education.	

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	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	
. North Dakota North Dakota Century Code Annotated, Vol. 2, Sec.10-24-01-10-28-22 (1960;1967 Pocket Supplement)	Routine	N.P.	N.P.	N.P.	
. Ohio Page's Ohio Revised Code, Annotated; Title 17, Sec. 1702.01-1702.99 (1964; 1967 Supplement), Sec.1713.01-1713.29 (1964; 1967 Supplement)	Routine (See Col. 2 & 6)	Board of Regents issues certificate of authorization to all nonprofit corporations.	Any nonprofit university, college, school, offering instruction reading to a degree of post high school academic work.	Restriction on use of "college" or "university" unless approved by Board of Regents.	No unl
. Oklahoma Oklahoma Statutes Annotated, Title 18, Chap. 14, Sec.541-550;571-575 (1953)	Routine	Accredited by State Regents for Higher Education or by Regional	N.P.	N.P.	Pri tut tho by app acc
7. Oregon Oregon Revised Statutes, Vol.1, Sec. 61.005-61.950;351.710-351.760;351.990 (1967)	Routine	N.P.	N.P.		App Sta unl
. Pennsylvania, Purdon's Penn. Statutes Annotated; Title 15, Sec. 7201-7211; 7312 (1967)	State Secretary of Education must endorse before charter is granted.	N.P.	N.P.	Corporate name cannot use term "college" or "university"-State Board of Education grants certificate allowing use of such name.	No inc les end a m tim cou

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	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
	N.P.	N.P.	N.P.	
ty, ing a hool	Restriction on use of "college" or "university" unless approved by Board of Regents.	No degrees may be awarded unless approval.	Board of Regents establish standards for certificate of authorization.	Adequate facilities included in Board of Regents standards.
	N.P.	Private educational institutions may grant only those degrees authorized by State Regents, unless approved by Regional accrediting agency.	State Regents for Higher Education shall prescribe regulations and standards for accredition.	
		N.P. Approval required from State Board of Education unless Regionally-accredited.		
	Corporate name cannot use term "college" or "university"- State Board of Education grants certificate allowing use of such name.	No degrees may be awarded or incorporation permitted unless college has a minimum endorsement of $500,000; a minimum of 8 faculty (full-time); admission requirements, course requirements.		

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	
9. Rhode Island General Laws of Rhode Island, Title 7, Chap.6, Sec.7-6-1-7-6-16; Title 16,Chap.40, Sec.16-40-1 (Vol. 2-3, 1957;1967 Pocket Supplement see also, Chap.49 amended in 1969 to form Board of Regents.)	No institution may be incorporated or established until Secretary of State receives certification of Board of Regents, over Commission of Education's signature.	All private institutions must be registered and approved by Board of Regents.	All institutions of higher education.	N.P.	Power must approv
0. South Carolina Code of Laws of South Carolina, Chap.13, Sec. 12-745-12-765 (Vol. 3,1962; 1967 Cumulative Supplement)	Routine	N.P.	N.P.	N.P.	
1. South Dakota Laws of 1965, Chap. 24: South Dakota Nonprofit Corporation Act.	Routine	N.P.	N.P.	N.P.	
2. Tennessee Tennessee Code Annotated, Title 48,Chap.1-14 (1968 Special Supplement)	Routine	N.P.	N.P.	N.P.	
3. Texas Vernon's Civil Statutes of the State of Texas, Art. 1396-2.01; Art. 1302-3.02 Vol.3 (1962)	Routine	N.P.	N.P.	N.A.	

	4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
ner	N.P.	Power to grant degrees must be in charter and approved by Regents.	Board of Regents promulgates standards-adequate faculty facilities, and equipment.	
	N.P.	N.P.	N.P.	Exemption from regulating scheme for degree granting institutions; public institutions.
	N.P.	N.P.	N.P.	
	N.P.	N.P.	N.P.	
	N.A.	N.A.	Central Education Agency and Commissioner of Education regulate proprietary schools but public institutions; private degree-granting institutions whose credits are transferable, are exempt.	

4 RESTRICTION TITLES	5 DEGREES	6 STANDARDS/RULES AND REGULATIONS	7 COMMENTS
N.P.	N.P.	N.A.	
Use of title descriptive of college or university prohibited unless incorporated under Col.1.	No corporation shall grant degrees unless authorized and certified by State Board of Education.	State Board of Education with advice of Vermont Higher Education Council, shall promulgate rules and regulations providing for certification.	Exempt from title and degree restrictions are institutions in state chartered in another state and regionally accredited.
N.P.	No educational institution in state may confer any college degree-academic, professional, or honorary-until approved by State Council of Higher Education.	N.P.	
N.P.			
N.P.	Approval of Board of Regents required.	Board of Regents determined minimum standards for conferring of degrees.	

	1 INCORPORATION CHARTERING	2 LICENSING	3 TYPES	4 RESTRICTION TITLES	DEG
Wisconsin West's Wisconsin Statutes Annotated, Title 17, Chaps. 181 and 182; Sec. 181.01-181.76; 182.028-182.029 (Vol. 22, 1957; 1968 Cumulative Annual Pocket Part)	Routine	N.P.	N.P.	N.P.	
Wyoming Wyoming Statutes, Chap.8.1 and 9; Sec.17-122.117-133 (Vol.5, 1965 Replacement Volume; 1967 Cumulative Supplement).	Routine	N.P.	N.P.	N.P.	
District of Columbia	Routine	License from D.C. Board.	All types of academic institutions.	N.P.	

Appendix C

MODEL STATUTE PROPOSED BY EDUCATIONAL COMMISSION ON THE STATES

Appendix C

MODEL STATE LEGISLATION

Report of the
Task Force on Model State Legislation for
Approval of Postsecondary Educational Institutions
and Authorization to Grant Degrees

Education Commission of the States
1860 Lincoln Street
Suite 300
Denver, Colorado 80203

June, 1973

Report Number 39

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FOREWORD

In response to a number of requests from several states, the U.S. Office of Education, the Department of Defense, the Veterans Administration, accrediting agencies, and other sources for guidance and assistance on how to deal with practices in postsecondary education which could be considered questionable, unethical, or fraudulent, the Education Commission of the States (ECS) agreed to establish a Task Force to consider the problems, including the possibility of developing model state legislation. The work of the Task Force was supported in part by a grant from the Federal Interagency Committee on Education--U.S. Office of Education, the Veterans Administration, and the Department of Defense.

The Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees drew its membership from representatives of the Education Commission of the States, state government, state agencies concerned with different aspects of postsecondary education and its regulation, the Office of Education, major accrediting agencies, postsecondary educational institutions (including complex institutions), and proprietary education. A list of the Task Force members is attached.

I believe, especially with key interests represented on the Task Force, that all the major issues were discussed fully. The model legislation was developed from those deliberations. Noted in the commentary and in the model legislation is the possibility for alternatives. Because of the unique circumstances and traditions among the states, the Task

Force recognizes that variations from its model legislation may--and, in fact, should--occur. The issue of which agency of state government should administer the provisions of the Act is illustrative. Many would argue for using an existing agency, such as the coordinating or governing board for higher education and postsecondary education in a state or, in some cases, the board of education. Others would argue for the creation of a special commission that for the purposes of the Act would have jurisdiction in relation to all postsecondary educational institutions.

Therefore, recognizing that the function of model legislation is to serve as a guide that may be modified to meet the particular needs of individual states, I am pleased to present this report, including the proposed model legislation and commentary, on behalf of the Task Force and the Education Commission of the States.

The Honorable Tom Jensen
Tennessee State Representative
and House Minority Leader
Task Force Chairman

TASK FORCE ON MODEL STATE LEGISLATION FOR APPROVAL OF POSTSECONDARY EDUCATIONAL INSTITUTIONS AND AUTHORIZATION TO GRANT DEGREES

Chairman

The Honorable Tom Jensen*
State Representative and Minority Leader
Tennessee House of Representatives
208 War Memorial Building
Nashville, Tennessee 37219
(615) 741-3947

Members

Dr. Philip F. Ashler
Executive Vice Chancellor
Florida Board of Regents
State University System of Florida
107 West Gaines Street
Tallahassee, Florida 32304
(904) 488-4731

Dr. Frank G. Dickey
Executive Director
National Commission on Accrediting
One Dupont Circle, Suite 760
Washington, D.C. 20036
(202) 296-4196

Mr. William Goddard
Executive Director
National Association of Trade and Technical Schools
2021 L Street, N.W.
Washington, D.C. 20036
(202) 296-8892

call

Mr. Kenneth Hatanpa
State Supervisor
Private Vocational Schools
Minnesota Department of Education
Capitol Square
550 Cedar Street
St. Paul, Minnesota 55101
(612) 296-3316

Dr. T. Edward Hollander
Deputy Commissioner of Higher Education
Board of Regents, University of the State of New York
State Education Department
Albany, New York 12224
(518) 474-5851

Dr. James Kessler
Commissioner for Higher Education
Commission on Higher Education
215 North Senate Avenue
Indianapolis, Indiana 46204
(317) 633-6474

---

*Representative Jensen is Vice Chairman of the Natural Resources Subcommittee of the Intergovernmental Relations Committee of the National Legislative Conference.

Members--Continued

Dr. Robert Kirkwood
Executive Director
Federation of Regional Accrediting
Commissions of Higher Education
One Dupont Circle, N.W.
Suite 770
Washington, D.C. 20036
(202) 872-1197

Dr. N. Edd Miller
President
University of Nevada
Reno, Nevada 89507
(702) 784-6908

Dr. John R. Proffitt
Director
Accreditation and Institutional
Eligibility Staff
Bureau of Higher Education
U.S. Office of Education
7th and D Streets, S.W.
Washington, D.C. 20202
(202) 962-1054

Consultant Members

Dr. John Leslie
Director
Division of Special Occupational
Services
University of the State of
New York
State Education Department
Albany, New York 12224
(518) 474-8648

Mr. Morris "Bob" Nooner
Acting Director
Education and Rehabilitation
Services
Veterans Administration
810 Vermont Avenue
Washington, D.C. 20420
(202) 393-4120

Dr. Bernard Michael
Executive Director
Federal Interagency Committee
on Education
400 Maryland Avenue, S.W.
Room 2049
Washington, D.C. 20202
(202) 962-4912

Legal Counsels

Mr. Robert L. Frye
Isaacson, Rosenbaum, Goldberg
and Miller
1700 Broadway, Suite 1518
Denver, Colorado 80202
(303) 893-5656

Mr. Bernard H. Ehrlich
Attorney at Law
919 Eighteenth Street, N.W.
Washington, D.C. 20006
(202) 296-5848

TASK FORCE ON MODEL STATE LEGISLATION FOR APPROVAL OF POSTSECONDARY EDUCATIONAL INSTITUTIONS AND AUTHORIZATION TO GRANT DEGREES

Introduction

Access to postsecondary educational opportunity for all Americans received renewed emphasis at the national level with the passage of the Education Amendments of 1972. Postsecondary education in the United States is varied and diverse in terms of institutions, programs, and courses of study available. The Education Amendments of 1972 permit even greater variety and diversity by encouraging expanded recognition of the institutions and programs that may be considered viable and acceptable at the post-high school level.

As in the past, variety and diversity continue to contribute to the vitality of postsecondary education. Its general availability to virtually all Americans also steadily increases, and this should continue. However, while vitality and availability flourish, there is the danger that questionable, unethical, or fraudulent practices may exploit the manner in which postsecondary education is offered and conducted.

Prior to 1972, the United States Office of Education reported that approximately 2,700 postsecondary institutions were accredited by agencies recognized for this purpose by the Office of Education. In addition, there were about 300 unaccredited colleges and universities in the United States. Of the 300, it was estimated that about 110 could be considered "diploma mills," essentially providing no training or education, but selling degrees for a price. The other 190 may not have satisfied the standards for accreditation but were making honest efforts to meet the required standards.

With the inclusion in the 1972 Amendments of much less restrictive criteria for qualifying for federal funds, an expanded recognition of viable and acceptable postsecondary programs and institutions was encouraged. Thus, rather than 3,000 colleges and universities, current estimates suggest a total of approximately 14,000 institutions and programs comprising the range of postsecondary institutions, including traditional higher educational institutions, postsecondary vocational and technical institutions, and other private and proprietary schools. Accordingly, while the actual number of institutions and programs with questionable, unethical, or fraudulent practices may be small, the leeway for such practices may be greater, and estimates suggest that unsuspecting consumers may be fleeced of several million dollars each year.

Since the legal responsibility for authorizing the existence and continuation of postsecondary educational institutions, programs, and courses of study rests fundamentally with the states, it follows that a logical step for controlling questionable, unethical, or fraudulent practices would be enactment of statutes or amendments of existing state laws for this purpose on certain guidelines or models.

Accordingly, the Education Commission of the States (ECS) Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees offers the following model for state legislation.

MODEL STATE LEGISLATION

Report of the
Task Force on Model State Legislation for Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees

Addenda

1. REFERENCE: Section 6. Minimum Standards. (1)(a)(iv) of Model Legislation; Add to Commentary:

   A requirement that qualifications of students for enrollment in an institution be included in the institution's catalogue was discussed. It was not included in the suggested legislation because such a requirement might be considered as a mandate to establish such qualifications, thereby introducing a barrier to educational innovation by institutions which would like to consider all applicants without regard to formal prerequisites. The Task Force has no desire to dampen innovation in this area, but would suggest that if regulations can be drawn carefully to require disclosure of such qualifications by schools which have strict requirements in this area, while leaving other schools free to experiment with innovative, less rigid admissions requirements, this would be desirable.

2. REFERENCE: Section 6. Minimum Standards. (1)(a)(xii) of Model Legislation; Add to Commentary:

   "Consideration should be given to inclusion in the regulations, as a part of the 'fair and equitable' cancellation policy required of institutions, of a 'cooling-off period,' in which the purchaser of educational services would be given a specified time to reconsider his commitment to purchase, and to cancel if he chose to do so."

3. REFERENCE: Section 19. Violations-Civil-Penalty., and Section 20. Violations-Criminal-Penalty. of Model Legislation; Add to Commentary:

   The Task Force did not undertake to determine specific numbers of dollars or time for penalties, but is in agreement that the penalties shall be severe enough to act as a deterrent to the prohibited acts.

July 31, 1973

MODEL LEGISLATION

Re: Approval of Postsecondary Educational Institutions and Authorization to Grant Degrees

Text

AN ACT

relating to postsecondary educational institutions, [designating the __________] (an appropriate state education agency) [creating a Commission on Postsecondary Institutional Authorization] and vesting the same with the power to authorize and regulate postsecondary educational institutions and agents thereof in the [State] [Commonwealth] of __________; assigning powers and duties to such agency; regulating the granting of academic degrees and the naming of educational institutions; providing for the preservation of academic records; and for other purposes.

BE IT ENACTED by the Legislature of the [State] [Commonwealth] of __________.

Section 1. Short Title. This Act may be cited as the Postsecondary Educational Authorization Act of 19__.

Section 2. Purposes. It is the purpose of this Act to provide for the protection, education, and welfare of the citizens of the [State] [Commonwealth] of __________, its postsecondary educational institutions, and its students, by:

Commentary

Purposes. Section 2 sets forth the Act's purposes related to protecting citizens, students, and institutions against questionable, unethical, and fraudulent practices (including such practices by institutions referred to as

Text

(a) establishing minimum standards concerning quality of education, ethical and business practices, health and safety, and fiscal responsibility, to protect against substandard, transient, unethical, deceptive, or fraudulent institutions and practices;

(b) prohibiting the granting of false or misleading educational credentials;

(c) regulating the use of academic terminology in naming or otherwise designating educational institutions;

(d) prohibiting misleading literature, advertising, solicitation, or representation by educational institutions or their agents;

(e) providing for the preservation of essential academic records; and

(f) providing certain rights and remedies to the consuming public and the [Agency] [Commission] necessary to effectuate the purposes of this Act.

Section 3. Definitions. As used in this Act:

(a) "Postsecondary educational institution" includes, but is not limited to, an academic, vocational, technical, home study, business, professional, or other school, college, or university, or other organization or person, offering

Commentary

"degree mills") through the state's regulatory powers.

Definitions. The critical definition in Section 3 is "postsecondary educational institution." Here the Task Force, in cooperation with the Federal Interagency Committee on Education and the U.S. Office of Education, attempted to develop a sufficiently broad definition to include all operations and programs available to

Text

educational credentials, or offering instruction or educational services (primarily to persons who have completed or terminated their secondary education or who are beyond the age of compulsory high school attendance) for attainment of educational, professional, or vocational objectives.

(b) "To operate" an educational institution, or like term, means to establish, keep, or maintain any facility or location in this [State] [Commonwealth] where, from, or through which, education is offered or given, or educational credentials are offered or granted, and includes contracting with any person, group, or entity to perform any such act.

(c) "Authorization to operate" or like term means approval of the [Agency] [Commission] to operate or to contract to operate a postsecondary educational institution in this [State] [Commonwealth].

(d) "To offer" includes, in addition to its usual meanings, advertising, publicizing, soliciting, or encouraging any person, directly or indirectly, in any form, to perform the act described.

(e) "To grant" includes awarding, selling, conferring, bestowing, or giving.

Commentary

persons of post-high school age. The Task Force chose a broad definition with specific exemptions, rather than a narrow or restrictive definition, to avoid creating loopholes inadvertently.

A broad definition for the representative of a postsecondary educational institution also was recognized as critical. Accordingly, "agent" refers to anyone who receives compensation from an institution and who, on behalf of the institution, attempts to encourage people to attend, enroll, or receive educational credentials from his institution or program.

Text

(f) "Education" or "educational services" or like term includes, but is not limited to, any class, course, or program of training, instruction, or study.

(g) "Agent" means any person owning any interest in, employed by, or representing for remuneration, a postsecondary educational institution within or outside this [State] [Commonwealth], who, by solicitation in any form made in this [State] [Commonwealth], enrolls or seeks to enroll a resident of this [State] [Commonwealth] for education offered by such institution, or offers to award educational credentials, for remuneration, on behalf of any such institution, or who holds himself out to residents of this [State] [Commonwealth] as representing a postsecondary educational institution for any such purpose.

(h) "Agent's permit" means a nontransferable written authorization issued to a natural person by the [Agency] [Commission] which allows that person to solicit or enroll any resident of this [State] [Commonwealth] for education in a postsecondary educational institution.

(i) "Educational credentials" means degrees, diplomas, certificates, transcripts, reports,

Commentary

Text

documents, or letters of designation, marks, appellations, series of letters, numbers, or words which signify, purport, or are generally taken to signify enrollment, attendance, progress, or satisfactory completion of the requirements or prerequisites for education at a postsecondary educational institution.

(j) "Entity" includes, but is not limited to, any company, firm, society, association, partnership, corporation, and trust.

(k) Alternative One. ["Agency" means the __________.] (An appropriate state education agency.)

(k) Alternative Two. ["Commission" means the Commission on Postsecondary Institutional Authorization.]

Section 4. Exemptions. The following education and educational institutions are exempted from the provisions of this Act:

(a) Institutions exclusively offering instruction at any or all levels from pre-school through the twelfth grade.

(b) Education sponsored by a bona fide trade, business, professional, or fraternal organization, so recognized by the [Agency] [Commission], solely for that organization's

Commentary

Exemptions. While the Act is designed to encompass virtually all of postsecondary education, certain programs are exempted, since the Task Force felt that the possibility of their violating consumer protection would be remote.

Section 4 suggests alternatives for exempting public postsecondary educational institutions. Alternative One would exempt all public institutions. Alternative Two would exempt the same

Text

membership, or offered on a no-fee basis.

(c) Education solely avocational or recreational in nature, as determined by the [Agency] [Commission], and institutions offering such education exclusively.

(d) Education offered by eleemosynary institutions, organizations, or agencies, so recognized by the [Agency] [Commission], provided such education is not advertised or promoted as leading toward educational credentials.

(e) Alternative One. [Postsecondary educational institutions established, operated, and governed by this [State] [Commonwealth] or its political subdivisions, as determined by the [Agency] [Commission].]

(e) Alternative Two. [Postsecondary educational institutions established, operated, and governed by this [State] [Commonwealth] or its political subdivisions; provided, however, such institutions meet minimum standards accepted by the [Agency] [Commission] for authorizing all other postsecondary educational institutions of like kind or character.]

Section 5. [_________ Agency.] [Commission on Postsecondary Institutional Authorization.]

Commentary

institutions, but with the condition that they satisfy at least the minimum standards applicable to the non-exempt institutions, as established and enforced by the state agency or commission.

[_________ Agency] [Commission on Postsecondary Institutional Authorization]. Section 5 suggests alternatives for

Text

(1) Alternative One. [Designation. [__________] (an appropriate state education agency) shall administer the provisions of this Act, in addition to its duties presently provided by law; and for the purposes thereof, the [Agency] may hire such personnel as may be necessary, subject to the availability of appropriations. To effectuate the purposes of this Act, the [Agency] may request from any department, division, board, bureau, commission, or other agency of the state, and the same shall provide, such information as will enable the [Agency] to exercise properly its powers and perform its duties hereunder.]

(1) Alternative Two. [Establishment. There is hereby established [The Commission on Postsecondary Institutional Authorization] which shall administer the provisions of this Act, within and subject to the jurisdiction of the __________. The [Commission] may hire such personnel as may be necessary, subject to the availability of appropriations. To effectuate the purposes of this Act, the director may request from any department, division, board, bureau, commission, or other agency of the state, and the same shall provide, such information as will enable the director to exercise properly his powers and perform his duties

Commentary

placing authority in the state government and sets forth the powers and duties of the agency or commission.

The Task Force felt that it would be inappropriate to suggest to the state where governmental authority should be placed for carrying out the provisions of the Act. The designation of an existing agency or commission in the state, or the establishment of a new agency, would depend upon circumstances within the particular state--statutes, constitutional constraints, accepted practice, and political realities.

If an existing agency is designated under Section 6, it should have the capability and experience for using regulatory powers. It should also have an understanding and empathy for the institutions to be regulated. Further, if it is not currently representative of the constituent institutions to be regulated, it should develop an appropriate advisory structure with such representation.

On the other hand, if a new commission is formed, the Act needs to be further expanded to specify methods of selection or appointment of the commission's members, terms of office, provisions for removing members and filling vacancies, and provisions for staff and their functions. These

Text

hereunder.] (See commentary regarding structure of commission and related problems.)

(2) Powers and Duties. The [Agency shall have, in addition to the powers and duties now vested therein by law,] [Commission shall have] the following powers and duties:

(a) To establish minimum criteria in conformity with Section 6 of this Act, including quality of education, ethical and business practices, health and safety and fiscal responsibility, which applicants for authorization to operate, or for an agent's permit, shall meet before such authorization or permit may be issued, and to continue such authorization or permit in effect. The criteria to be developed hereunder shall be such as will effectuate the purposes of this Act, but will not unreasonably hinder legitimate educational innovation.

(b) To receive, investigate as it may deem necessary, and act upon applications for authorization to operate postsecondary educational institutions and applications for agent's permits.

(c) To maintain a list of postsecondary educational institutions and agents authorized to operate in this [State] [Commonwealth] under the provisions of this Act. Said list shall be available for the information of the public.

Commentary

stipulations would be cited in Section 5, Establishment. The commission should have fair and equitable representation of the various components of postsecondary education and of the public.

Powers and Duties. This part of Section 5 offers specific suggestions concerning the responsibilities that would be given to the agency or commission. Although certain cited powers and duties are self-explanatory, some need comment. For paragraph (a), minimum standards, explanation is offered in Section 6.

Paragraph (d) encourages reciprocity agreements among the states. For example, in some states informal exchanges currently take place in regard to background information on an institution or an agent just starting to do business in a particular state. Some states have adopted formal statements of mutual cooperation in sharing information. The Task Force recommends and encourages these mutual efforts, but cautions that such formal agreement cannot relieve the agency or commission of its authority and responsibility as provided for in the Act, and the state must retain the right to conduct independent inquiry and take independent action where desirable or necessary.

Text

(d) To negotiate and enter into interstate reciprocity agreements with similar agencies in other states, if in the judgment of the [Agency] [Commission] such agreements are or will be helpful in effectuating the purposes of this Act; provided, however, that nothing contained in any such reciprocity agreement shall be construed as limiting the [Agency's] [Commission's] powers, duties, and responsibilities with respect to independently investigating or acting upon any application for authorization to operate or any application for renewal of such authorization to operate for a postsecondary educational institution, or an application for issuance of or renewal of any agent's permit, or with respect to the enforcement of any provision of this Act, or any of the rules or regulations promulgated hereunder.

(e) To receive and cause to be maintained as a permanent file, copies of academic records in conformity with Section 17 of this Act.

(f) To promulgate rules, regulations, and procedures necessary or appropriate for the conduct of its work and the implementation of this Act, which rules and regulations shall have the force of law; and to hold such hearings as it may deem advisable or as required by law in developing such rules, regulations, and procedures, or in aid

Commentary

Paragraph (e) provides for the preservation of academic records of institutions that cease to exist. To prevent the loss of such records, the agency or commission would have the authority and responsibility for causing the records to be maintained and could legally seize such records if, in its reasonable judgment, that appeared necessary. (See Section 17.)

of any investigation or inquiry.

(g) To investigate as it may deem necessary, on its own initiative or in response to any complaint lodged with it, any person, group, or entity subject to, or reasonably believed by the [Agency] [Commission] to be subject to, the jurisdiction of this Act; and in connection therewith to subpoena any persons, books, records, or documents pertaining to such investigation, which subpoenas shall be enforceable by any court of this [State] [Commonwealth]; to require answers in writing under oath to questions propounded by the [Agency] [Commission] and to administer an oath or affirmation to any person in connection with any investigation.

(h) To exercise other powers and duties implied but not enumerated in this Section but in conformity with the provisions of this Act which, in the judgment of the [Agency] [Commission], are determined necessary in order to carry out the provisions of this Act.

Section 6. Minimum Standards.

(1) In establishing the criteria required by Section 5 of this Act, the [Agency] [Commission] shall observe and shall require compliance with the following minimum standards:

Minimum Standards. Section 6 sets forth minimum standards that must be included in the criteria developed by the agency or commission for determining whether an institution may operate within the state. Essentially, these criteria

Text

(a) A postsecondary educational institution must be maintained and operated, or, in the case of a new institution, it must demonstrate that it can be maintained and operated, in compliance with the following minimum standards:

(i) That the quality and content of each course or program of instruction, training, or study are such as may reasonably and adequately achieve the stated objective for which the course or program is offered.

(ii) That the institution has adequate space, equipment, instructional materials, and personnel to provide education of good quality.

(iii) That the education and experience qualifications of directors, administrators, supervisors, and instructors are such as may reasonably insure that the students will receive education consistent with the objectives of the course or program of study.

(iv) That the institution provides students and other interested persons with a catalog or brochure containing information describing the programs offered, program objectives, length of program, schedule of tuition, fees, and all other charges and expenses necessary for completion of the course of study, cancellation and refund policies, and such other material facts concerning

Commentary

include consideration of the institution's ability to enable students to reach its educational objectives and assurance that it has the means of doing so. They also encompass adequate, fair, and accurate information for prospective students in regard to the objectives, costs, and conditions involved. The Act requires not only truth in advertising, but also disclosure of relevant information.

Paragraphs (i) through (vi) of Part (1)(a) relate specifically to objectives, facilities, qualifications of staff, information, credentials, and records.

Paragraphs (vii), (viii) and (xi) deal with the minimum standards for the physical and fiscal conditions of the institution, including protection of the consumer in terms of health, safety, and fiscal responsibility.

Paragraph (iv) establishes the minimum informational disclosure items that should be available about the institution or educational program and should be read in conjunction with paragraph (ix), relating to disclosure practices which are false, deceptive, misleading, or unfair.

Part (1)(b) sets forth the conditions to be satisfied by any applicant for an agent's permit,

Text

the institution and the program or course of instruction as are reasonably likely to affect the decision of the student to enroll therein, together with any other disclosures specified by the [Agency] [Commission] and/or defined in the rules and regulations; and that such information is provided to prospective students prior to enrollment.

(v) That upon satisfactory completion of training, the student is given appropriate educational credentials by said institution, indicating that said course or courses of instruction or study have been satisfactorily completed by said student.

(vi) That adequate records are maintained by the institution to show attendance, progress, or grades, and that satisfactory standards are enforced relating to attendance, progress, and performance.

(vii) That the institution is maintained and operated in compliance with all pertinent ordinances and laws, including rules and regulations adopted pursuant thereto, relative to the safety and health of all persons upon the premises.

(viii) That the institution is financially sound and capable of fulfilling its commitments

Commentary

and specifies that among these conditions is that the institution he represents must satisfy the minimum standards as proposed in the Act or set forth by the agency. Accordingly, any person receiving an agent's permit, as defined in Section 9, would be representing an institution or program conforming to at least the minimum standards established in the Act and enforceable by the agency or commission.

Part (2) permits the agency or commission to accept accreditation of an institution by an accrediting agency approved by the U.S. Commissioner of Education as evidence of the institution's conformance to the minimum standards set forth in the Act or by the agency. However, the use of such accredited status is permissive, not mandatory, and the state agency may require additional evidence or may undertake its own investigation if it so desires or the circumstances warrant. While the Task Force sanctions the use of accreditation status as possible evidence of compliance with statutory minimum standards, it does not intend that the agency or commission abrogate its statutory responsibility through substitution of accreditation for independent review and action.

Text

Commentary

to students.

(ix) That neither the institution nor its agents engage in advertising, sales, collection, credit, or other practices of any type which are false, deceptive, misleading, or unfair.

(x) That the chief executive officer, trustees, directors, owners, administrators, supervisors, staff, and instructors are of good reputation and character.

(xi) That the student housing owned, maintained, or approved by the institution, if any, is appropriate, safe, and adequate.

(xii) That the institution has a fair and equitable cancellation and refund policy.

(b) An applicant for an agent's permit shall be an individual of good reputation and character and shall represent only a postsecondary educational institution or institutions which meet the minimum standards established in this Section 6 and the criteria established under Section 5 of this Act.

(2) Accreditation by national or regional accrediting agencies recognized by the United States Office of Education may be accepted by the [Agency] [Commission] as evidence of compliance with the minimum standards established hereunder and the criteria to be established

Text

under Section 5 of this Act; provided, the [Agency] [Commission] may require such further evidence and make such further investigation as in its judgment may be necessary. Accreditation by a recognized, specialized accrediting agency may be accepted as evidence of such compliance only as to the portion or program of an institution accredited by such agency if the institution as a whole is not accredited.

Section 7. Prohibition. No person, agent, group, or entity of whatever kind, alone or in concert with others, shall:

(a) Operate in this [State] [Commonwealth] a postsecondary educational institution ~~not exempted~~ from the provisions of this Act, unless said institution has a currently valid authorization to operate issued pursuant to the provisions of this Act.

(b) Offer, as or through an agent, enrollment or instruction in, or the granting of educational credentials from, a postsecondary educational institution not exempted from the provisions of this Act, whether such institution is within or outside this [State] [Commonwealth], unless such agent is a natural person and has a currently valid agent's permit issued pursuant to the provisions of this Act, nor accept contracts

Commentary

Prohibition. Section 7 cites practices by institutions or their agents that are specifically prohibited by the Act. A resident institution cannot operate within the state without authorization to do so, nor may an agent without a permit operate within the state, whether representing an out-of-state or resident institution. Neither an institution nor its agent may operate or solicit in the state unless the institution meets the minimum standards set forth in the Act. Thus, although out-of-state institutions are not required prior to soliciting in a state to apply for an "authorization to operate," when they do solicit, they immediately become subject to the jurisdiction of the courts within that state, and may be enjoined if they fail to meet the minimum standards required under the Act.

or enrollment applications from an agent who does not have a current permit as required by this Act; provided, however, that the [Agency] [Commission] may promulgate rules and regulations to permit the rendering of legitimate public information services without such permit.

(c) Instruct or educate, or offer to instruct or educate, including advertising or soliciting for such purpose, enroll or offer to enroll, contract or offer to contract with any person for such purpose, or award any educational credential, or contract with any institution or party to perform any such act, in this [State] [Commonwealth], whether such person, agent, group, or entity is located within or without this [State] [Commonwealth], unless such person, agent, group, or entity observes and is in compliance with the minimum standards set forth in Section 6 (1) of this Act, the criteria established by the [Agency] [Commission] pursuant to Section 5 (2)(a) hereof, and the rules and regulations adopted by the [Agency] [Commission] pursuant to Section 5 (2)(f) hereof.

(d) Use the term "university" or "college" without authorization to do so from the [Agency] [Commission].

Text

(e) Grant, or offer to grant, educational credentials, without authorization to do so from the [Agency] [Commission].

Section 8. Authorization to Operate.

(1) Each postsecondary educational institution desiring to operate in this [State] [Commonwealth] shall make application to the [Agency] [Commission], upon forms to be provided by the [Agency] [Commission]. Said application shall be accompanied by a catalog or brochure published, or proposed to be published by the institution, containing the information specified in Section 6 (1)(a)(iv) of this Act, including information required by rules and regulations of the [Agency] [Commission]. (Said application shall also be accompanied by evidence of a surety bond as required by this Act, and payment of the fees specified herein.)

(2) Following review of such application and any further information submitted by the applicant, or required by the [Agency] [Commission], and such investigation of the applicant as the [Agency] [Commission] may deem necessary or appropriate, the [Agency] [Commission] shall either grant or deny authorization to operate to the applicant. A grant of authorization to operate may be on such terms and conditions as the [Agency] [Commission] may specify.

Commentary

Authorization to Operate. Agent's Permit. Sections 8 and 9 develop the procedures and conditions for obtaining or renewing the institution's authorization to operate and the agent's permit.

Text

Commentary

(3) The authorization to operate shall be in a form recommended and approved by the [Agency] [Commission] and shall state in clear and conspicuous manner at least the following information:

(a) The date of issuance, effective date, and term of approval.

(b) The correct name and address of the institution so authorized.

(c) The authority for approval and conditions thereof.

(d) Any limitation of the authorization, as deemed necessary by the [Agency] [Commission].

(4) The term for which authorization is given shall not extend for more than [one] [two] years, and may be issued for a lesser period of time.

(5) The authorization to operate shall be issued to the owner, or governing body, of the applicant institution, and shall be nontransferable. In the event of a change in ownership of the institution, a new owner, or governing body, must, within ten (10) days after the change in ownership, apply for a new authorization to operate, and in the event of failure to do so, the institution's authorization to operate shall terminate. Application for a new authorization

to operate by reason of change in ownership of the institution shall for purposes of Section 10 (2) of this Act, be deemed an application for renewal of the institution's authorization to operate. "Ownership" for purposes of this section shall be deemed to mean ownership of a controlling interest in the institution, or in the event the institution is owned or controlled by a corporation or other legal entity other than a natural person or persons, ownership of a controlling interest in the legal entity owning or controlling such institution.

(6) At least sixty (60) days prior to the expiration of an authorization to operate, the institution shall complete and file with the [Agency] [Commission] an application form for renewal of its authorization to operate. Said renewal application shall be reviewed and acted upon as provided hereinabove.

(7) An institution not yet in operation when its application for authorization to operate is filed may not begin operation until receipt of authorization. An institution in operation when its application for authorization to operate is filed may continue operation until its application is acted upon by the [Agency] [Commission], and thereupon its authority to operate shall be

Text	Commentary
governed by the action of the [Agency] [Commission]. In any event, the [Agency] [Commission] may issue provisional authorization to operate, containing such limitations as to time, procedures, functions, or other conditions as the [Agency] [Commission] may deem necessary.	
Section 9. Agent's Permit.	
(1) Each person desiring to solicit or perform the services of an agent, as herein defined, in this [State] [Commonwealth], shall make application to the [Agency] [Commission], upon forms to be provided by said [Agency] [Commission]. Said application shall be accompanied by evidence of the good reputation and character of the applicant, in a form to be prescribed by the [Agency] [Commission], and shall state the institution or institutions which the applicant intends to represent. An agent representing more than one institution must obtain a separate agent's permit for each institution represented; provided, that when an agent represents institutions having a common ownership, only one agent's permit shall be required with respect to said institutions. In the event any institution which the applicant intends to represent does not have authorization to operate in this [State]	

Text

Commentary

[Commonwealth], said application shall be accompanied by the information required of institutions making application for such authorization. Said application for an agent's permit shall also be accompanied by evidence of a surety bond as required by this Act, and payment of the fees specified herein.

(2) Following review of such application and any further information submitted by the applicant, or required by the [Agency] [Commission], and such investigation of the applicant as the [Agency] [Commission] may deem necessary or appropriate, the [Agency] [Commission] shall either grant or deny an agent's permit to the applicant.

(3) The agent's permit shall be in a form recommended and approved by the [Agency] [Commission] and shall state in a clear and conspicuous manner at least the following information:

(a) The date of issuance, effective date, and term.

(b) The correct name and address of the agent.

(c) The institution or institutions which such agent is authorized to represent.

(4) The term for which an agent's permit is issued shall not extend for more than [one] [two]

years, and may be issued for a lesser period of time.

(5) At least sixty (60) days prior to the expiration of an agent's permit, the agent shall complete and file with the [Agency] [Commission] an application form for renewal of said permit. Said renewal application shall be reviewed and acted upon as provided hereinabove.

Section 10. Denial of Authorization to Operate or Agent's Permit.

(1) If the [Agency] [Commission], upon review and consideration of an application for authorization to operate, or for an agent's permit, or for renewal thereof, shall determine that the applicant fails to meet the criteria established as provided in this Act, the [Agency] [Commission] shall so notify the applicant, setting forth the reasons therefor in writing, and shall deny the application.

(2) The [Agency] [Commission] may grant to an applicant for renewal an extension of time of reasonable duration in which the applicant may eliminate the reason or reasons for denial contained in the statement of denial, if the applicant has demonstrated to the satisfaction of the [Agency] [Commission] its or his desire to meet

Denial of Authorization to Operate or Agent's Permit. [Agency] [Commission] Review. Revocation of Authorization to Operate or Agent's Permit. Sections 10, 11, and 12 are designed to establish safeguards and due-process requirements in connection with applications for authorization to operate, agent's permits, and renewals thereof.

Text | **Commentary**

the requirements of Section 6 of this Act and the criteria established pursuant to Section 5 of this Act, and if in the judgment of the [Agency] [Commission], it would be reasonably possible for the applicant to meet said requirements and criteria within such time.

(3) In the event the [Agency] [Commission] denies an application for an agent's permit, or for renewal thereof, it shall notify the institution or institutions which said agent represented or proposed to represent, according to the records of the [Agency] [Commission], including the reasons therefor.

Section 11. [Agency] [Commission] Review. Any person aggrieved by a decision of the [Agency] [Commission] respecting denial of an authorization to operate, or of an agent's permit, or the placing of conditions thereon, whether on initial application or on application for renewal, and any person aggrieved by the imposition of a penalty by the [Agency] [Commission] under Section 19 of this Act, shall have the right to a hearing and review of such decision by the [Agency] [Commission] as provided herein.

(a) If, upon written notification of any such action taken by the [Agency] [Commission], the aggrieved party desires a hearing and review,

Text

such party shall notify the [Agency] [Commission], in writing, within ten (10) days after the giving of notice of such action, otherwise said action shall be deemed final.

(b) Upon receiving such notice from the aggrieved party, the [Agency] [Commission] shall fix the time and place for a hearing, and shall notify the aggrieved party thereof.

(c) At such hearing, the party may employ counsel, shall have the right to hear the evidence upon which the action is based, and present evidence in opposition or in extenuation. The hearing shall be conducted in accordance with the [Administrative Code of this [State] [Commonwealth]] [Rules of Civil Procedure of this [State] [Commonwealth]]. Any member of the [Agency] [Commission] may preside except where a clear conflict of interest may be demonstrated.

(d) A decision of the [Agency] [Commission] following hearing, or on expiration of the time for demand of a hearing if no such demand is filed, shall be deemed final, subject to the right of judicial review provided hereinafter. All matters presented by hearing as provided herein shall be acted upon promptly by the [Agency] [Commission], and the [Agency] [Commission] shall notify all parties in writing of its decision,

Commentary

which shall include a statement of findings and conclusions upon all material issues of fact, law, or discretion presented at the hearing, and the appropriate rule, order, sanction, relief, or denial thereof.

Section 12. Revocation of Authorization to Operate or Agent's Permit.

(1) An authorization to operate or an agent's permit may be revoked or made conditional after its issuance if the [Agency] [Commission] has reasonable cause to believe that the holder of said authorization or permit has violated or is violating this Act or any rules and regulations promulgated hereunder. Prior to such revocation or imposition of condition, the [Agency] [Commission] shall notify the holder of the authorization or permit in writing of the impending action, setting forth the grounds for the action contemplated to be taken and advising the holder of a permit that if a hearing is requested, in writing, within ten (10) days of receipt of said notice, the [Agency] [Commission] shall set a time and place for a hearing at which the holder of the authorization or permit may be heard in response to the allegation of non-compliance with the provisions of this Act.

Text

(2) If a hearing is requested as aforesaid, such hearing shall be conducted as provided in Section 11(c) of this Act, and the holder of the authorization or permit shall have the rights set forth therein. The decision of the [Agency] [Commission] shall be made as provided in Section 11(d) of this Act, and shall be deemed final, subject to the right of judicial review provided hereinafter. In the event an agent's permit is revoked or condition imposed thereon, the [Agency] [Commission] shall notify the institution or institutions which said agent was permitted to represent, as shown in the records of the [Agency] [Commission], in addition to the notice required to be given to the agent and any other parties to the hearing.

Section 13. Complaints of Violations.

(1) Any person claiming damage or loss as a result of any act or practice by a postsecondary educational institution or its agent, or both, which is a violation of this Act or of the rules and regulations promulgated hereunder, may file with the [Agency] [Commission] a verified complaint against such institution or against its agent or both. The complaint shall set forth the alleged violation and shall contain such other information as may be required by the [Agency] [Commission].

Commentary

Complaints of Violations. *Section 13 provides that people who believe that they have been victimized by postsecondary institutions or agents may have a place to go to file a complaint--and that if relief or restitution for loss or damage caused by the acts complained of is justified, in the judgment of the agency or commission, it can award the person such relief. Also, based on the complaint, the agency or commission may initiate an investigation into the activities of the institution or agent. If it finds such complaint*

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A complaint may also be filed by [Director of Agency] [Commissioner] or the Attorney General with the [Agency] [Commission]. A complainant may also file with the [Agency] [Commission] as a representative of a class of complainants.

(2) The [Agency] [Commission] shall investigate any such complaint and may, at its discretion, attempt to effectuate a settlement by persuasion and conciliation. The [Agency] [Commission] may consider a complaint after ten (10) days written notice by registered mail, return receipt requested, to such institution or to such agent, or both, as appropriate, giving notice of a time and place for hearing thereon. Such hearing shall be conducted in accordance with the [Administrative Code of this [State] [Commonwealth]] [Rules of Civil Procedure of this [State] [Commonwealth]].

(3) If, upon all the evidence at a hearing, the [Agency] [Commission] shall find that a post-secondary educational institution or its agent, or both, has engaged in or is engaging in, any act or practice which violates this Act or the rules and regulations promulgated hereunder, the [Agency] [Commission] shall issue and cause to be served upon such institution or agent or both, an order requiring such institution or agent or both to cease and desist from such act or practice.

Commentary

justified, it may order the act or practice to cease, impose penalties on the institution or the agent, or revoke an institution's authorization to operate or an agent's permit.

Additionally, if the [Agency] [Commission] shall find that the complainant, or class of complainants, has suffered loss or damage as a result of such act or practice, the [Agency] [Commission] may, at its discretion, award the complainant, or class of complainants, full or partial restitution for such damage or loss and may impose the penalties provided for in Section 19 hereof. The [Agency] [Commission] may also, as appropriate, based on its own investigation and/or the evidence adduced at such hearing, commence an action to revoke an institution's authorization to operate or an agent's permit.

Section 14. Judicial Review. Any person aggrieved or adversely affected by any final [Agency] [Commission] action, or by any penalty imposed by the [Agency] [Commission], may obtain judicial review of such action as provided in this section.

Judicial Review. Section 14 elaborates on due process for the institutions and agents, as well as for student consumers, by providing court review of agency or commission action.

(a) An action for judicial review may be commenced in any court of competent jurisdiction in accordance with the [Rules of Civil Procedure] within thirty (30) days after such [Agency] [Commission] action becomes effective.

(b) Upon a finding that irreparable injury would otherwise result, the [Agency] [Commission], upon application therefor, shall postpone the effective date of its action pending judicial review, or the reviewing court, upon application therefor, and upon such terms and upon such security, if any, as the court shall find necessary, shall issue appropriate process to postpone the effective date of the [Agency's] [Commission's] action or to preserve the rights of the parties pending conclusion of the review proceedings.

(c) The record on review, unless otherwise stipulated by the parties, shall include the original or certified copies of all pleadings, applications, evidence, exhibits, and other papers presented to or considered by the [Agency] [Commission], and the decision, findings, and action of the [Agency] [Commission]. As to alleged procedural irregularities, evidence may be taken independently by the court.

(d) If the court finds no error, it shall affirm the [Agency's] [Commission's] action. If it finds that such action was arbitrary or capricious, a denial of statutory right, contrary to constitutional right, power, privilege, or immunity, in excess of statutory jurisdiction, authority, purposes, or limitation, not in accord with the procedures or procedural limitations of this Act, or otherwise required by law, an abuse

Text BEST COPY AVAILABLE **Commentary**

or clearly unwarranted exercise of discretion, unsupported by substantial evidence when the record is considered as a whole, or otherwise contrary to law, then the court shall hold unlawful and set aside the [Agency] [Commission] action, and afford such relief as may be appropriate.

(e) The decision of the trial court shall be subject to appellate review in the same manner and with the same effect as in appeals from a final judgment or decree in any other civil action.

Section 15. Bonds Required.

(1) At the time application is made for authorization to operate, or for renewal thereof, the [Agency] [Commission] may require the post-secondary educational institution making such application to file with the [Agency] [Commission] a good and sufficient surety bond in such sum as may be determined by the [Agency] [Commission]. Said bond shall be executed by the applicant as principal and by a surety company qualified and authorized to do business in this [State] [Commonwealth]. The bond shall be conditioned to provide indemnification to any student or enrollee or his parent or guardian, or class thereof, determined to have suffered loss or damage as a result of any act or practice which is a violation of this Act by

Text

said postsecondary educational institution, and that the bonding company shall pay any final, non-appealable judgment rendered by the [Agency] [Commission] or any Court of this [State] [Commonwealth] having jurisdiction, upon receipt of written notification thereof. Regardless of the number of years that such bond is in force, the aggregate liability of the surety thereon shall in no event exceed the penal sum of the bond. The bond may be continuous.

(2) An application for an agent's permit shall be accompanied by a good and sufficient surety bond in a penal sum of $__________. Said bond shall be executed by the applicant as principal and by a surety company qualified and authorized to do business in this [State] [Commonwealth]. The bond may be in blanket form to cover more than one agent for a postsecondary educational institution, but it shall cover each agent for said institution in a penal sum of $__________. The bond shall be conditioned to provide indemnification to any student, enrollee, or his or her parents or guardian, or class thereof, determined to have suffered loss or damage as a result of any act or practice which is a violation of this Act by said agent, and that the bonding company shall pay any

Commentary

Bond repeat

final, non-appealable judgment rendered by the [Agency] [Commission] or any Court of this [State] [Commonwealth] having jurisdiction, upon receipt of written notification thereof. Regardless of the number of years that such bond is in force, the aggregate liability of the surety thereon shall in no event exceed the penal sum thereof. The bond may be continuous.

(3) The surety bond to be filed hereunder shall cover the period of the authorization to operate or the agent's permit, as appropriate, except when a surety shall be released as provided herein. A surety on any bond filed under the provisions of this section may be released therefrom after such surety shall serve written notice thereof to the [Agency] [Commission] __________ days prior to said release; but said release shall not discharge or otherwise affect any claim theretofore or thereafter filed by a student or enrollee or his parent or guardian for loss or damage resulting from any act or practice which is a violation of this Act alleged to have occurred while said bond was in effect, nor for an institution's ceasing operations during the term for which tuition has been paid while said bond was in force.

(4) Authorization for an institution to operate and an agent's permit shall be suspended by

Text

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Commentary

operation of law when said institution or agent is no longer covered by a surety bond as required by this section; but the [Agency] [Commission] shall cause said institution or agent, or both, to receive at least thirty (30) days written notice prior to the release of the surety, to the effect that said authorization or permit shall be suspended by operation of law until another surety bond shall be filed in the same manner and like amount as the bond being terminated.

Section 16. Fees. All fees collected pursuant to the provisions of this Act shall be deposited in the [State Treasury] to the credit of the general fund, and no fees collected under the provisions of this Act shall be subject to refund. The fees to be collected by the [Agency] [Commission] hereunder shall accompany an application for authorization to operate or an agent's permit, in accordance with the following schedule:

(a) The initial application fee for postsecondary educational institutions shall be $__________.

(b) The [annual] renewal fee for a postsecondary educational institution shall be $__________.

(c) The initial fee for an agent's permit shall be $__________.

Text

(d) The [annual] renewal fee for an agent's permit shall be $__________.

Section 17. Preservation of Records. In the event any postsecondary educational institution now or hereafter operating in this [State] [Commonwealth] proposes to discontinue its operation, the chief administrative officer, by whatever title designated, of such institution shall cause to be filed with the [Agency] [Commission] the original or legible true copies of all such academic records of such institution as may be specified by the [Agency] [Commission]. Such records shall include, at a minimum, such academic information as is customarily required by colleges when considering students for transfer or advanced study; and, as a separate document, the academic record of each former student. In the event it appears to the [Agency] [Commission] that any such records of an institution discontinuing its operations are in danger of being destroyed, secreted, mislaid, or otherwise made unavailable to the [Agency] [Commission], the [Agency] [Commission] may seize and take possession of such records, on its own motion, and without order of court. The [Agency] [Commission] shall maintain or cause to be maintained a permanent file of such records coming into its possession.

Commentary

Preservation of Records. Section 17 is included in the Act to insure availability of academic records for students who may need them at a later date. The Act authorizes the agency or commission to preserve or cause to be preserved academic records at institutions that cease to exist, as well as to seize such records if they are in danger of being destroyed, secreted, or otherwise made unavailable.

Text

Section 18. Enforceability of Notes, Contracts, Etc.

(1) If the person to whom educational services are to be rendered or furnished by a post-secondary educational institution is a resident of this [State] [Commonwealth] at the time any contract relating to payment for such services, or any note, instrument, or other evidence of indebtedness relating thereto, is entered into, the provisions of this section shall govern the rights of the parties to such contract or evidence of indebtedness. In such event the following agreements entered into in connection with the contract or the giving of such evidence of indebtedness are invalid:

(a) That the law of another state shall apply;

(b) That the maker or any person liable on such contract or evidence of indebtedness consents to the jurisdiction of another state;

(c) That another person is authorized to confess judgment on such contract or evidence of indebtedness;

(d) That fixes venue.

(2) No note, instrument or other evidence of indebtedness, or contract relating to payment for

Commentary

Enforceability of Notes, Contracts, Etc. Part (1) of Section 18 is designed to end a common practice of unscrupulous out-of-state institutions that may obtain judgments for tuition or other charges in their own states against students from other states. Under such circumstances, the student is often unable adequately to defend the suit.

Parts (3), (4), and (5) would prevent use of the "holder in due course" doctrine, under which an institution might otherwise use a third party to collect payments from a student for services not yet provided and which may never be provided. These provisions of the Act would permit the student to assert any defenses he might have in a suit to collect the institution's charges.

education or educational services shall be enforceable in the courts of this [State] [Commonwealth] by any postsecondary educational institution operating in this [State] [Commonwealth] unless said institution shall have received authorization to operate under the provisions of this Act; nor by any postsecondary educational institution having an agent or agents in this [State] [Commonwealth] unless any and all agents who enrolled or sought to enroll the person to whom such services were to be rendered, or to whom educational credentials were to be granted, had an agent's permit at the time of their contact with such person.

(3) For purposes of this section, "lending agency" shall mean any postsecondary educational institution, or any person, group, or entity controlling, controlled by, or held in common ownership with, such institution, or regularly loaning money to, or to students of, such institution.

(4) Any lending agency extending credit or loaning money to any person for tuition, fees, or any charges whatever of a postsecondary educational institution for educational or other services or facilities to be rendered or furnished by said institution, shall cause any note, instrument, or

Text

other evidence of indebtedness taken in connection with such loan or extension of credit to be conspicuously marked on the face therof, "Student Loan." In the event such lending agency fails to do so, it shall be liable for any loss or damage suffered or incurred by any subsequent assignee, transferee, or holder of such evidence of indebtedness on account of the absence of such notation.

(5) Notwithstanding the presence or absence of such notation, and notwithstanding any agreement to the contrary, the lending agency making such loan or extending such credit, and any transferee, assignee, or holder of such evidence of indebtedness shall be subject to all defenses and claims which could be asserted against the postsecondary educational institution which was to render or furnish such services or facilities, by any party to said evidence of indebtedness or by the person to whom such services or facilities were to be rendered or furnished, up to the amount remaining to be paid thereon.

Section 19. Violations-Civil-Penalty. Any person, group, or entity, or any owner, officer, agent, or employee thereof, who shall violate the provisions of Section 7 of this Act, or who shall fail or refuse to deposit with the [Agency] [Commission] the records required by Section 17 of this

Commentary

Violations-Civil-Penalty/ Violations-Criminal-Penalty. Civil penalties for violations of the Act (Section 19) may be imposed by the agency or commission or by a court, whereas criminal penalties (Section 20) may be imposed only by a court.

Act, shall be subject to a civil penalty not to exceed $__________ for each violation. Each day's failure to comply with the provisions of said sections shall be a separate violation. Such fine may be imposed by the [Agency] [Commission] in an administrative proceeding or by any court of competent jurisdiction.

Section 20. Violations-Criminal-Penalty. Any person, group, or entity, or any owner, officer, agent, or employee thereof, who shall willfully violate the provisions of Section 7 of this Act, or who shall willfully fail or refuse to deposit with the [Agency] [Commission] the records required by Section 17 of this Act, shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine not to exceed $__________, or by imprisonment in the county jail not to exceed __________ months, or by both such fine and imprisonment. Each day's failure to comply with the provisions of said sections shall be a separate violation. Such criminal sanctions may be imposed by a court of competent jurisdiction in an action brought by the Attorney General of this [State] [Commonwealth] or a District Attorney pursuant to Section 22 hereof.

Section 21. Jurisdiction of Courts; Service of Process. Any postsecondary educational institution not exempt from the provisions of this Act,

Jurisdiction of Courts; Service of Process. *Section 21 would make postsecondary institutions, wherever located, subject*

Text

whether or not a resident of or having a place of business in this [State] [Commonwealth], which instructs or educates, or offers to instruct or educate, enrolls or offers to enroll, contracts or offers to contract, to provide instructional or educational services in this [State] [Commonwealth], whether such instruction or services are provided in person or by correspondence, to a resident of this [State] [Commonwealth], or which offers to award or awards any educational credentials to a resident of this [State] [Commonwealth], submits such institution, and, if a natural person his personal representative, to the jurisdiction of the courts of this [State] [Commonwealth], concerning any cause of action arising therefrom, and for the purpose of enforcement of this Act by injunction pursuant to Section 22 hereof. Service of process upon any such institution subject to the jurisdiction of the courts of this [State] [Commonwealth] may be made by personally serving the Summons upon the defendant within or outside this [State] [Commonwealth], in the manner prescribed by the [Rules of Civil Procedure] of this [State] [Commonwealth], with the same force and effect as if the Summons had been personally served within this [State] [Commonwealth]. Nothing contained in this section shall limit or affect the right to serve any process

Commentary

to the jurisdiction of the courts of states enacting this proposed legislation, if such institutions provided or solicited to provide education to residents of the enacting state. The section has two main purposes: (1) To enable an individual dealing with the institution to bring suit in his own state, rather than having to go to the state where such institution was located, and (2) to enable the agency or commission to obtain an injunction against fraudulent or deceptive practices of the institution, or against other practices of the institution that violated the Act.

Text

as prescribed by the [Rules of Civil Procedure] of this [State] [Commonwealth].

Section 22. Enforcement; Injunction.

(1) The Attorney General of this [State] [Commonwealth], or the District Attorney of any district in which a postsecondary educational institution or an agent thereof is found, at the request of the [Agency] [Commission] or on their own motion, may bring any appropriate action or proceeding (including injunctive proceedings, or criminal proceedings pursuant to Section 20 hereof) in any court of competent jurisdiction for the enforcement of the provisions of this Act.

(2) Whenever it shall appear to the [Agency] [Commission] that any person, agent, group, or entity is, is about to, or has been violating any of the provisions of this Act or any of the lawful rules, regulations, or orders of the [Agency] [Commission], the [Agency] [Commission] may, on its own motion or on the written complaint of any person, file a petition for injunction in the name of the [Agency] [Commission] in any court of competent jurisdiction in this [State] [Commonwealth] against such person, group, or entity, for the purpose of enjoining such violation or for an order directing compliance with the provisions of this Act, and all rules, regulations, and orders issued

Commentary

hereunder. It shall not be necessary that the [Agency] [Commission] allege or prove that it has no adequate remedy at law. The right of injunction provided in this section shall be in addition to any other legal remedy which the [Agency] [Commission] has, and shall be in addition to any right of criminal prosecution provided by law; provided, however, the [Agency] [Commission] shall not obtain a temporary restraining order without notice to the person, group, or entity affected. The existence of [Agency] [Commission] action with respect to alleged violations of this Act shall not operate as a bar to an action for injunctive relief pursuant to this Section.

Section 23. Funding. [Note: Appropriations or authorizations therefor should be provided for as appropriate.]

Section 24. Severability. In the event any section, subsection, sentence, clause, or phrase of this Act shall be declared or adjudged invalid or unconstitutional, such adjudication shall in no manner affect the other sections, subsections, sentences, clauses, or phrases of this Act, which shall remain of full force and effect, as if the section, subsection, sentence, clause, or phrase so declared or adjudged invalid or unconstitutional were not originally a part hereof. The state

Text | *Commentary*

legislature hereby declares that it would have passed the remaining parts of this Act if it had known that such part or parts hereof would be declared or adjudged invalid or unconstitutional.

Section 25. Effective Date. For the purpose of making the necessary preparations to implement the provisions of this Act, it shall become effective, __________, but for all other purposes, this Act shall become effective __________.

Section 26. Repealer. [Note: [State] [Commonwealth] should determine which, if any, laws are in conflict with this Statute and should be repealed.]

Appendix D

FRACHE GUIDELINES ON ACCREDITATION AND NON-TRADITIONAL STUDY: POLICY STATEMENT ON INNOVATION: GUIDELINES ON CONTRACTUAL RELATIONS WITH NON-REGIONALLY ACCREDITED ORGANIZATIONS

FEDERATION OF REGIONAL ACCREDITING COMMISSIONS OF HIGHER EDUCATION

POLICY STATEMENT ON INNOVATION

The Federation of Regional Accrediting Commissions of Higher Education welcomes perceptive and imaginative experimentation which aims at intensifying the effectiveness of higher education. The Federation supports no particular theories or styles of education or organization. Neither does it prescribe specific rules or formulas. It is cognizant that special requirements may pertain to some institutions, but these should not be permitted to inhibit new approaches and emphases in their educational programs. The Federation insists only that new departures or adaptations be consistent with an institution's purposes and objectives as originally established or as modified to accommodate new conditions.

Adopted by the Council - April 28, 1970

FEDERATION OF REGIONAL ACCREDITING COMMISSIONS OF HIGHER EDUCATION

INTERIM STATEMENT ON ACCREDITATION AND NON-TRADITIONAL STUDY

Accreditation procedures for non-traditional programs should encourage innovative and imaginative approaches to providing quality education whether in new institutions or in those already accredited. The accrediting process generally should move toward assessment of the results of education rather than its processes, and developments in non-traditional studies and degrees provide opportunities to do so. At the same time, the Federation emphasizes that accreditation is concerned with institutional improvement and that attention to outcomes only, without considering the relation of these to the environments and educational processes, would be of little assistance to either traditional or non-traditional programs in raising questions and providing suggestions for improvement.

The Federation believes that, at this early stage in the development of non-traditional degree programs, the principles, policies, and procedures specified for accreditation must be flexible and of an interim nature. As the nature of innovative developments becomes clarified and experience is gained in working with them, accreditation policies and procedures can be adjusted to attain a uniform approach to the traditional and the innovative in such manner that the better procedures of each are called to the attention of both. In this context, the statement of policies and principles presented here is tentative and interim. It is a working set of guidelines which will require continued monitoring, clarification, and revision as experience in their application evolves.

General Policies

1. Accreditation will be considered only when a number of individuals have been granted or have qualified for a degree by various non-traditional patterns indicated. Consideration of students' completed programs and student reactions are deemed indispensable to accreditation.

2. Accreditation procedures and criteria should be comprehensive, flexible, and fair. Evaluation committees should include persons who have experience in non-traditional programs and/or who are sufficiently conversant and understanding to review innovations competently.

3. An institution which, by the nature of its program, abandons or renders non-functional traditional criteria and mechanisms of review and control aimed at assuring quality must accept responsibility for indicating alternative ways in which quality will be assured.

Guidelines

1. When degrees based heavily on non-traditional patterns of study are offered, evidence will be required that the degrees are awarded on the basis of definite criteria and demonstrated competency commensurate with the level and nature of the degrees.

2. The appraisal, evaluation or examination procedures of an institution must be conducted with a high degree of objectivity, with due regard for

maintenance of honesty and security, and with explicit statements of criteria and standards for judging satisfactory performance. The learner's self-appraisal of the worth of an experience is a valuable but not sufficient basis for awarding credit or a degree.

3. Publicity statements to prospective students must be factual. For example, actual services provided must be consistent with publicity. This will require monitoring adjunct professors to assure that they fulfill their commitments.

4. To protect the integrity of the faculty-institution work relationship and avoid circumstances involving conflict of interest, policies regarding the amount of outside work for pay and safeguards surrounding use of institutional resources and facilities for their intended purposes are required. The relationship of full time faculty serving as adjunct faculty or program advisers and using the learning resources and facilities of their full time employer for programs of study offered by other institutions (accredited or unaccredited) should conform to their institution's policies and standards on these matters.

5. The conditions and circumstances of subcontracts with adjunct faculty in the community, with museums, art institutes, libraries, government agencies, foreign study institutions, and other diverse learning facilities should be made explicit and should be in conformity with the policies and standards of the institutions on such matters. They should be accompanied by a description of the means to be used for documenting and evaluating the work done by the student in reference to the objectives of the programs of study.

6. The conditions and circumstances of subcontracts by unaccredited institutions with accredited institutions for use by students of their learning resources, facilities, and degree-granting prerogatives should be made explicit. They should also be in conformity with the usual institutional policies and procedures safeguarding their intended use, and with the Federation's guidelines on "Contractual Relationships with Non-Regionally Accredited Organizations".

The concern here is both with the placement of responsibility, the use and availability of resources, and the relation between student charges, services rendered, and benefits acquired.

* * * * * *

NOTE: Questions about these principles and guidelines should be directed to the office of the appropriate regional accrediting commission.

Approved by the Council
March 14, 1973

Appendix E

PROPOSED REVISED CRITERIA FOR NATIONALLY RECOGNIZED ACCREDITING AGENCIES AND ASSOCIATIONS

Appendix E

MEMORANDUM

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
OFFICE OF EDUCATION

TO : Nationally Recognized Accrediting Agencies and Associations and Other Interested Organizations and Individuals

DATE: August 25, 1972

FROM : John R. Proffitt, Director
Accreditation and Institutional Eligibility Staff

SUBJECT: Second Working Draft of the Proposed Changes to the Criteria for Nationally Recognized Accrediting Agencies

1. The attached second working draft has been prepared subsequent to review of the first working draft, and of comments received concerning it, by the Commissioner of Education's Advisory Committee on Accreditation and Institutional Eligibility, which met on August 8-9, 1972.

2. We are of the opinion that this is a much-improved document which substantially reflects the written and oral advice received by the Staff prior to August 1. We are most appreciative of the many constructive and supportive statements which we received in this report.

3. Your comments concerning the second draft will be most welcome. We have established a deadline of October 15, 1972, for receipt of comments in order that a third, final draft may be presented to the fall meeting of the Advisory Committee. I will, of course, be pleased to meet with anyone in order to discuss this draft, upon request.

SECOND WORKING DRAFT
For Discussion Purposes Only
Not for Publication

August 25,1972

Proposed Revised Criteria for Nationally Recognized Accrediting Agencies and Associations

Preamble. For the purpose of determining eligibility for Federal assistance, pursuant to Public Law 82-550 and subsequent legislation, the U.S. Commissioner of Education is required to publish a list of nationally recognized accrediting agencies and associations which he determines to be reliable authority as to the quality of training offered by educational institutions or programs.

The Commissioner will recognize any and all agencies only for the geographic area(s) and program fields(s) specifically designated in each case. Recognition of an accrediting agency signifies the agency's compliance with the Criteria for Recognition.

Accrediting is the process whereby an association or agency grants public recognition to a school, institute, college, university, or specialized program of study which meets certain established qualifications and educational standards, as determined through initial and periodic evaluations. Accrediting also implies stimulation toward quality improvement beyond the minimum standards specified by the accrediting body.

Criteria

The following are the criteria which the U. S. Commissioner of Education will utilize in designating a nationally recognized accrediting agency or association as reliable authority as to the quality of training offered by the educational institutions or programs which it accredits.

The accrediting agency or association is—

I. Functional, as demonstrated by—

A. Its scope of operations

1. The agency or association is national or regional in its scope of operations. (Agencies which are regional in scope will be recognized only if their purview is limited to institutional accreditation and their jurisdiction includes three or more States.)

2. The agency or association clearly sets forth the scope of its activities as to geographical area, types, and levels of institutions or programs covered.

B. Its organization

1. The agency or association has the administrative personnel and procedures to administer its accrediting activities in a professional manner.

2. The agency or association develops its own fiscal policies and has adequate financial support, as shown by an externally audited financial statement, to carry out its operations.

   a. Its charges, if any, for the accreditation process do not exceed the reasonable cost of sustaining the process.

3. The agency or association uses a variety of competent and knowledgeable persons qualified by experience and training (i) to participate on visiting teams, (ii) to engage in consultative activities, (iii) to serve on decision-making bodies.

C. Its procedures

1. The agency or association maintains clear definitions of preaccreditation status (if applicable), accredited status, and probationary status, and has developed clear written procedures for granting, denying, reaffirming, revoking, and reinstating accredited status and preaccredited status (if applicable) and for imposing and withdrawing probationary status.

2. The agency or association, if it has developed a preaccreditation status, provides for the application of criteria and procedures that are comparable to those employed for accreditation.

3. The agency or association requires, as an integral part of its accrediting process, institutional or program self-analysis and on-site reviews by visiting teams.

   a. The self-analysis shall be a qualitative assessment of the strengths and limitations of the institution or program, including the achievement of institutional or program objectives, and shall involve a representative portion of the institution's administrative staff, teaching faculty, students, governing body, or other significant constituencies.

   b. The agency or association provides written and consultative guidance to both the institution and visiting teams.

II. Accountable, as demonstrated by evidence that—

A. Accreditation in the field in which it operates comprehensively serves clearly identified needs, taking into account the welfare or interests of students, the general public, the academic, professional, or occupational fields, Federal and State governments, and institutions. Its purposes and objectives are clearly disseminated.

B. It is responsible to the public interest.

1. The agency or association includes public representatives in its policy and decision-making bodies.

2. The agency or association publishes or otherwise makes publicly available:

   a. The standards against which institutions or programs are evaluated;

   b. The process and procedures utilized in arriving at decisions regarding the accreditation status of an institution or program;

   c. The current accreditation status of institutions or programs;

   d. The names and affiliations of the members of its policy and decision-making bodies.

3. The agency or association provides advance notice of proposed or revised standards through its regular channels of communication, supplemented, if necessary, to inform interested members of the affected community. In addition, it provides such persons the opportunity to comment on the standards prior to their adoption.

4. The agency or association has written procedures for the review of complaints pertaining to institutional or program quality as these relate to the agency's standards, and demonstrates that these procedures result in timely and effective treatment of such complaints in a manner fair to both the complainant and to the institution.

C. It assures that due process is accorded to institutions or programs seeking accreditation or renewal of accreditation, as demonstrated in part by:

1. Affording initial evaluation of the institutions or programs only when the chief executive officer of the institution applies for accreditation of the institution or any of its programs, and providing for the suspension of any accredited institution or program when reevaluation is not permitted after due notice;

2. Providing for adequate discussion during the site visit between the team of visitors and the faculty, administrative staff, students, and other segments of the institutional or program community as appropriate;

3. Furnishing, as a result of the accreditation visit, a written report to the institution or program with comments on areas of strength, on areas needing improvement, and when appropriate, suggested means of improvement and specific comments on the areas, if any, where the institution or program may not be in compliance with the agency's standards;

4. Providing the chief executive officer of the institution with an opportunity to comment upon the written report or findings of the visiting team before the accrediting agency or association takes action on it;

5. Evaluating, when appropriate, the report of the visiting team in the presence of a member of the team, preferably the chairman;

6. Providing a regular due process means for appeals related to accrediting actions.

D. It has demonstrated capability and willingness to foster ethical practices among the institutions or programs which it accredits.

1. It has ethical standards governing those areas of the institution or of the educational program, including nondiscriminatory practices in admissions and employment, which might affect the quality of education offered.

2. It has a statement, standard, or policy regarding equitable student tuition refunds on the part of institutions.

E. It maintains a program of evaluation of its educational standards designed to assess their validity and reliability.

F. It presents evidence that it secures sufficient qualitative date regarding the institution or program which show an ongoing program of evaluation of outputs consistent with the educational goals of the institution or program.

G. It encourages experimentation and innovation that is conceived and implemented in a manner which ensures the quality and integrity of the institution or program.

H. It demonstrates that it accredits only those institutions or programs which meet its published standards, that its standards, policies, and procedures are consistent and equitably applied, and that its evaluations are conducted and decisions are rendered under conditions that assure an impartial and objective judgment.

I. It reevaluates at reasonable intervals its accredited institutions or programs, and requires that any reference to accreditation clearly specifies the area and level of accreditation.

III. Reliable, as demonstrated by —

A. Acceptance throughout the United States of its policies, methods of evaluation, and decisions by educators, educational institutions, licensing bodies, practitioners, employers, students, and, where applicable, appropriate publics;

B. Regular review of its standards, policies and procedures, in order that the evaluation process shall support constructive analysis and shall emphasize factors of critical importance;

C. Not less than two years experience as an accrediting agency or association or, in the alternative, evidence that it has been organized under conditions which assure capability, stability and permanence;

D. Reflecting in the composition of its policy and decision-making bodies the constituencies which it accredits.

IV. Autonomous, as demonstrated by evidence that—

A. It performs no function that would be inconsistent with the formation of an independent judgment of the quality of an educational program or institution.

B. It provides in its operating procedure against conflicts of interest in the rendering of its judgments and decisions.

In view of the criteria set forth above, it is unlikely that more than one association or agency will qualify for recognition (a) in a defined geographical area of jurisdiction or (b) in a defined field of program specialization within secondary or postsecondary education.

These criteria supersede the criteria previously promulgated by the U.S. Commissioner of Education on January 16, 1969, 34 F. R. 643-644.

List

The following list of nationally recognized accrediting agencies and associations includes organizations which have been determined by the U.S. Commissioner of Education to be reliable authority as to the quality of training offered by educational institutions, either in a geographical area or in a specialized field, and the general scope of recognition granted to the accrediting bodies. This list is published as required by the pertinent legislation and is based upon information currently available. Any other agency or association which desires to be included in the list should request inclusion in writing.

Each agency or association listed will be reevaluated by the Commissioner at his discretion but at least once every four years. For initial recognition and for renewal of recognition, the agency or association will be requested to to furnish information establishing its compliance with the stated criteria. This information may be supplemented by personal interviews or inspection of the agency's facilities, records, personnel qualifications, and administrative procedures. No adverse decision will become final without affording reasonable notice and opportunity for a hearing.

Appendix F

A MODEL FRAMEWORK FOR MAKING ACCREDITATION DECISIONS IN ACCORDANCE WITH DUE PROCESS REQUIREMENTS

Appendix F

A MODEL FRAMEWORK FOR MAKING ACCREDITATION DECISIONS IN ACCORDANCE WITH DUE PROCESS REQUIREMENTS */

by

William A. Kaplin

Introduction

This procedural model has been drafted so as to coincide as nearly as possible with the general pattern of accreditation procedures followed by the various regional and professional accrediting agencies. Departures have been made at several key points, however, in order to correct some deficiencies often apparent in existing procedures. The result, hopefully, is a model which embodies the elements of fundamental fairness implicit in the concept of due process yet also permits accrediting agencies considerable flexibility in which to pursue their own particular needs and goals.

The Model set forth below presumes that the accrediting agency has already formulated and published the standards by which it will evaluate candidates for accreditation. While the manner in which such standards are formulated may itself give rise to due process considerations, such issues are largely beyond the model's scope. Rather than addressing itself to the subject matter and detail of the standards formulated by the accrediting agency, this model merely suggests a procedure which would allow applicants a fair opportunity to establish that they qualify under whatever standards exist.

The model also presumes that the accrediting agency has created some type of a committee to receive and consider applications for accreditation. A legitimate due process inquiry could be raised as to whether this committee which applies the agency's standards can be the same one that formulated the standards. Again, however, this issue is unresolved by the model.

I.

Applicant's Self-Study Report and Evaluation Team Report

After receiving a request for accreditation or reaccreditation, the committee on accreditation would: (1) fully inform the applicant of all eligibility criteria, standards for accreditation, and related policies and procedures of the agency; (2) require a self-study report from the applicant school, setting forth information on the applicant's purposes, programs, and strengths and weaknesses; and (3) send an evaluation team to the applicant school to make a similar, though independent, study.

Originally

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*/ Prepared as a basis for discussion at the USOE-NCA Workshop on Due Process in Accreditation, Hotel Dupont Plaza, Washington, D. C., May 18, 1970.

II.

Notice to Applicant of Evaluation Team's Report; Supplemental Material from Applicant

After the committee on accreditation has received the evaluation team's report, it would send a copy to the school. If the accrediting agency requires team members (acting either jointly or individually) to make specific recommendations about granting or denying accreditation, the substance of all such recommendations should be included in the report sent to the applicant. In order to preserve confidentiality, the committee could delete identifying references in the report to the comments or recommendations of individual members of the team.

The committee would provide the applicant school sufficient time, after reading the evaluation team's report and recommendations, to file any supplemental material it determined appropriate to respond to the facts and conclusions set forth in the report.

III.

The Committee's Determination Regarding the Application

After receiving the supplemental material (if any) which is filed by the applicant, the committee on accreditation would make a determination regarding the action to be taken on the school's application for accreditation. This determination would be based upon the information contained in: (1) the applicant's self-study report, (2) the evaluation team's report and recommendations, (3) the supplemental material filed by the applicant in response to the report and recommendations of the evaluation team, and (4) whatever additional material the committee determines to be relevant to the agency's accreditation standards, and regarding which it has informed the school and provided an opportunity for comment.

The committee's determination would (subject to the school's right to a hearing as provided in IV *infra*) become the accrediting agency's decision on the application for accreditation. If the decision is to grant accreditation, the school would thereupon be added to the list of accredited schools (or, if the application is for renewal of accreditation, the school's accredited status would thereupon be confirmed). If the decision is adverse (e.g., denial or withdrawal of accreditation, probationary status, or deferral of action), it would be accompanied by a specific statement of the committee's reasons for denying accreditation and a notification of the school's right to a hearing.

If the school requests a hearing, the accrediting agency would not make any public announcement of an adverse decision, and would not make any change in a school's status *vis a vis* accreditation, until such time as the decision has been affirmed by the panel which presides over the hearing.

IV.

The Hearing Subsequent to and Adverse Decision

If a school that has been adversely affected by the accrediting agency's decision requests a hearing, the agency would schedule the proceeding in a manner which provides the school with sufficient time and opportunity to prepare its argument. In order to achieve independent and objective judgment, the hearing would not be conducted by the committee which made the initial decision, and no member of that committee would be selected as a member of the hearing panel. The panel would be composed of five persons chosen (before the fact) by the accrediting agency's board of directors. At least one of these five persons shall have had prior experience on the agency's accrediting committee, and one person (who shall be a person that does not hold and never has held a position in the accrediting agency) shall be selected specifically as a representative of the general public.

The hearing panel would afford representatives of the school the opportunity to appear personally before it to present oral testimony and argument, written documents, and other evidence in the school's behalf. If requested by the school, appropriate representatives of the accreditation committee would be required to appear and explain the basis of the committee's decision, and representatives of the evaluation team would be required to explain the team report.

In addition to considering the evidence adduced at the hearing itself, the hearing panel would also consider the school's self-study report, the evaluation team report, and all other material relied upon by the accreditation committee, as well as the committee's statement of reasons for its decision. No other evidence would be considered by the hearing panel unless the school had been informed of such evidence and given an opportunity at the hearing to respond to it. At the conclusion of its deliberations, the hearing panel would issue its decision and a statement of reasons therefor. The accrediting agency could then take appropriate action with respect to the school's accredited status and could publicly announce the hearing panel's decision and the action taken in reliance upon it.

Summary

While the preceding model of accreditation procedures is intended to provide a flexible decision-making framework, it does incorporate several fundamental principles which should invariably be followed if the concept of due process is to be effectuated. The most significant of these principles are reiterated here:

(1) The agency should provide a copy of the evaluation team's report to the applicant school and give the school an opportunity to respond to it prior to the accreditation committee's decision.

(2) The applicant school should be informed in writing of the basis for the accreditation committee's denial of full accreditation.

(3) Before a decision to deny or withdraw accreditation becomes final, the school should be afforded notice and opportunity for a hearing at which its representatives may appear personally and present oral and documentary evidence.

(4) The accrediting agency should not publicly announce a denial or withdrawal of accreditation, or take action with respect to the school's status, until after completion of a full and fair hearing.

LEGAL CONSTRAINTS TO THE DEVELOPMENT OF EXTERNAL DEGREE PROGRAMS

Resource Bibliography

Richard S. Granat, Project Director

January 15, 1974

This bibliography is based on a search of library materials including journals, research reports, books, and a computer search of the ERIC data base. Abstracts of ERIC documents are reproduced here as they appear in Research In Education, a monthly bibliographical publication of the National Institute of Education.

1.0 The External Degree Movement-- General Works and Articles

Altman, Robert A. "The Upper Division College: Blueprint or Blind Alley?," Journal of Higher Education, vol. 41, no. 3, (March, 1970)p.204-212.

Outlines strengths and weaknesses of public upper-division institutions.

Baker, Dean C. "A Different Expression in Liberal Arts: Redesigning the Halls of Ivy: Innovations in Higher Education," Compact, vol. 6, no. 5, (October, 1972)p.12-15.

Describes the new Bachelor in Government Studies (BGS) degree program alternative offered by the College of Literature, Science & Arts at the University of Michigan. Compares the level of aptitudes, achievements, and interests of students in the BGS program to those of students in the traditional bachelors program. Provides the results of evaluations of the achievement of students in the two programs.

Baskin, S. Hallenbeck, E.F. "Nontraditional Programs of Undergraduate Learning; University Without Walls: Redesigning the Halls of Ivy: Innovations in Higher Education," Compact, vol. 6, no. 5, (October, 1972)p.21-25.

Recounts the history and development of the UWW program now underway at more than 20 colleges and universities. Describes the highly individualized and flexible programs of learning, key ideas, & concepts, degree & accreditation considerations, and financial implications.

Benoit, Richard P. "Alternative Programs for Higher Education: External and Special Degrees," Intellect, vol. 101, no. 2349, (April, 1973)p.422-5.

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Brooks, Dennis. "The First Year's Experience at the Open University," *College Management*, vol.7, no. 3, (March, 1972)p.28-29.

A report from Britain's Open University that teaches students in their spare time through a mixture of television and radio, correspondence courses, summer schools, and evening classes.

"Campus Free College," *Edcentric*, no. 22, (March, 1973) p. 16-18 (Boston, Mass.).

"Career Education: Myth or Magic," *NASSP Bulletin*, vol. 57, no. 371, (March, 1973)p.22-30.

The demand for career education is real and it is strong, concludes the author, who encourages educators to debate the concept after reviewing its basic components, current status and implications.

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Cross, Patricia K. "New Students in a New World," in *The Future in the Making*. San Francisco: Jossey-Bass, 1973.

Doran, Bernadette. "The External Degree Program: Credits Without Classes," College University Business, vol. 54. no. 4, (October, 1971)p.58-60.

The external degree provides an educational shortcut by providing credits for knowledge obtained outside of college.

Dressel, Paul L. "Graduate Programs: Experiments with Off-Campus Learning," Journal of Higher Education, vol. 43, no. 7, (October, 1972)p.525-530.

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"The Economics of the Open University: A Reply," Higher Education, p. 81-94.

"Everyone Overseas! Goshen College Pioneers," International Educational & Cultural Exchange, vol. 8, no. 2, (Fall, 1972)p.1-12.

A small private college has developed a unique study abroad program that involves virtually all of its students.

Frandson, P. E. "Beyond Extension: The University in the Lifelong Learning Society," ASPBAE Journal, vol. 7, no. 1-2,(August-November, 1972)p.5-14.

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Freedman, Leonard. "Degree Programs for Adults: Fad or Commitment?" NUEA Spectator, vol. 36, no. 9, (September, 1972)p.3-9.

Article discusses the role of extension education in the current movement toward external degrees. London University, The Open University, Empire State, and Goddard are some of the examples used as programs for non-traditional degrees.

Gardner, John. "Southern Illinois University: We Teach and Study and Raise all the Hell We can," Change, vol. 5, no. 5, (June, 1973)p.43-48.

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Gould, S. B. & Cross, K. P., eds. Explorations in Non-Traditional Study. San Francisco: Jossey Bass, 1972.

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Harvey, Thomas R. "A Process Evaluation Design for Higher Education," Journal of Higher Education, vol. 44, no. 4, (April, 1973)p.309-321.

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Houle, Cyril O. The External Degree. San Francisco: Jossey-Bass, 1973.

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Hurley, J. K. "Continuing Education by Tape Correspondence, "Australian Journal of Adult Education," vol. 12, no. 3, (November, 1972)p.91-100.

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Kearney, Kevin E. "Innovative Higher Education for Adults," Compact, p. 31-33.

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Krachenberg, A. R. "Bringing the Concept of Marketing to Higher Education," Journal of Higher Education, vol. 43, no. 5, (May, 1972)p.369-80.

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Owen, T. A. "The Power to Grant Degrees," Universities Quarterly, vol. 26, no. 3, (Summer, 1972)p.271-279.

Pierce, William F. "The Career Education Concept," American Education, vol. 9, no. 3, (April, 1973) p.4-6.

An OE Deputy Commissioner discusses the career approach to school reform and its stress on making the learner's interest paramount.

"Remote, Access Computing," Industrial Training International, vol. 7, no. 6, (June, 1972)p.187.

Describes success of Britain's Open University in making remote access computer facilities available to students enrolled in correspondence courses.

Robinson, Lerry W., Jr.; Crittenden, William B. "Learning Modules: A Concept for Extension Educators," Journal of Extension, vol. 10, no. 4, (Winter, 1972)p.35-44.

Authors propose a new concept--learning modules--with individual, small group, and programmed instruction, which has the potential of using computer-assisted technology.

Singh, Bakhshish, "A Future for Integrated Correspondence Study in Developing Countries," Convergence, Vol. 5, no. 3, (1972)p.76-79.

Examines administrative attitudes on correspondence education and notes that correspondence study is in many ways proving to be a more effective method of imparting education than the conventional class room instruction given in colleges and universities.

Streath, Howard. "Integrating Correspondence Study with Resident Study at the University Level," Convergence, vol. 5, no. 2, (1972)p.15-20.

Author gives numerous suggestions to increase personal interaction between student and teacher.

Sweet, David E. "City as Campus: The Audacity of MMSC," Community Services Catalyst, vol. 3, no. 2, (Fall, 1972)p.29-38.

A college without a campus is the situation at the new Minnesota Metropolitan State College, which carries the community services ethic to its logical conclusion.

Tobias, R. M. "The Theory of Evaluation in Adult Education," Journal of International Congress of University Adult Education, vol. 11, no. 3, (November, 1972)p.67-80.

Paper explores the meaning of evaluation, identifies some purposes for evaluation of adult education programs, and examines the process involved in evaluation.

Troutt, Roy, "College Degrees for Adults: Redesigning the Halls of Ivy; Innovations in Higher Education," Compact, vol. 6, no. 5, p.27-30.

Describes the unique Bachelor of Liberal Studies program at Univ. of Oklahoma, which serves as an adult education equivalent to more traditional baccalaureate programs.

Walsh, Joan. "The Open University: Breakthrough for Britain?," Science, vol. 174, no. 4010, p.675-678.

Watson, Goodwin. "Innovations in Higher Education," Journal of Research and Development in Education, vol. 5, no. 2, (Winter, 1972)p.73-75.

Surveys the rapid acceleration of innovation in recent years.

Wedemeyer, Charles A. "Towards an Extension-Oriented Research Environment--A Paradox, A Model, and a Proposal," NUEA Spectator, vol. 35, no. 10, (December, 1972)p.8-13.

Whitten, Woodrow C. "Floating Campus," Improving College and University Teaching, vol. 17, no. 4, (Autumn, 1969)p.283-286.

A report on the sea-faring college, once known as the University of the Seven Seas.

Zigerell, James J. "Universities without Walls and with no Illusions," Educational Television, vol. 3, no. 10, (October, 1971)p.17-18,28.

A look at the less traditional forms of higher education, including instructional television, evening divisions and extensions.

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2.0 The Problem of Quality Control

2.1 The States

Bender, Louis W. and Davis, James A. Danger: Will External Degrees Reincarnate Bogus Degree Mills? A Challenge to State and National Agencies. July 1972.

External degree programs can benefit American higher education, but they also promote the danger of fraudulent degree mills. This document offers a discussion of this potential problem that includes: (1) An historical review of degree mill activities; (2) The role of the Federal Government in this problem; (3) The role of the courts; (4) State statutory provisions; and (5) State agency-administrative actions. State action to remedy the problem of degree mill activity must come through stronger state laws and budgetary support for administering agencies. In addition, the council of state governments should work to promote uniform state legislation and a federal agency is needed to control the international dimensions of the degree mill problem.

Education Commission of the States. Model State Legislation: Report of the Task Force on Model State Legislation for Approval of Post Secondary Educational Institutions and Authorization to Grant Degrees. Report No. 39, June 1973.

This report with model legislation was produced by the Education Commission of the States in response to the proliferation of propietary and vocational schools. The legislation does not deal directly with the external degree problem.

Frye, Robert L. "Classification for Tuition Purposes: Model Legislation," Compact, vol. 5, no. 6, (December, 1971)p.7-10.

Hefferlin, J.B.L. *Cut-Rate Credits and Discount Degrees: Quality Controls of Non-traditional Study Through State Regulation and Voluntary Accreditation*. Princeton: Educational Testing Service, 1973.

Laird, David B., Jr. *The Regents of the University of Michigan and the Legislature of the State, 1920-1950*. Social Foundations of Education Monograph Series, Ann Arbor: University of Michigan, 1972.

The relationship of the regents of the University of Michigan and the legislature of the state, 1920-50 is discussed in historical perspective. An overview of the theory and practice of the relations between governing boards of public institutions of higher education and State Government is presented in Chapter 1. Chapter II traces the history of the University of Michigan and its constitutional status. Chapter III documents the modifications and changes that occurred in the relationship between the University and the State from 1920 to 1950. Chapter IV provides an analysis of the operational effects of the changing relationship between the regents and the legislature. The implications of the changes in the relationship are analyzed and resultant conclusions are summarized in Chapter V. An extensive bibliography of primary and secondary sources is included.

Millett, John D. "State Administration of Higher Education," *Public Administration Review*, v.30, n.2, pp. 101-106, Mar/Apr. '70.

National Commission on Accrediting. *Accreditation: "Federalization or Nationalization."* Annual Report of the Executive Director of the National Commission on Accrediting. Washington: National Commission on Accrediting, March 1972.

Critics have stated that the present system of accreditation stifles innovation. Because of this, a proposal has been made by the United States Office of Education to develop its own standards for deciding which colleges and universities should receive Federal funds. Therefore, institutions of higher education would be subjected to both non-governmental accreditation and a federal system of eligibility determination. In dealing with this

problem, the organization of the present system of accreditation was discussed emphasizing the need for a unified, national system of accrediting all higher education institutions, proprietary and specialized. An example of the recognition of this need was the report of the merger between the national commission on accrediting and the federation of regional accrediting commissions of higher education. A merger of this type then called for a look at the standards and criteria used in accreditation. The role of the total educational community was stressed because of the increasing involvement of state legislatures. The pressures on the organization of accreditation by the Federal and state governments and collective bargaining groups left the colleges and universities in the middle. Non-governmental accreditation can survive only through the unity of the accrediting community.

Reid, Robert H. American Degree Mills, Washington: American Council on Education, 1959.

This was one of the first booklets published on the degree mill problem. It was published by the American Council on Education after the Korean War when there was widespread exploitation of returning veterans. Although useful as a background resource, the booklet is presently out of date and does not deal with the problem of the external degree.

Strassenburg, A.A. "National and Legislative News: External Degree Programs," Journal of College Science Teaching, vol. 1, no. 4, (April, 1972) p. 13-22.

Williams, R.L. "Legal Bases for Establishment of Private Institutions of Higher Education," North Central Association Quarterly, 1970, p.44(3).

2.2 The Accreditation Associations

Andrews, Grover J. "Accreditation of Adult Education Programs in Higher Education," Adult Leadership, Vol. 20, N.10, (April 1972), p. 361.

Describes a new standard that seeks to encourage innovation and an imaginative approach by the college or university in providing quality instruction to its various constituents in special programs.

Anthony, Thomas S., "This Could be a New Kind of College Degree," College Board Review, n. 74, (w 69-70) p. 16.

Suggests that regional accrediting agencies grant degrees to students who have completed the requisite number of hours at a variety of qualified institutions.

Armstrong, Robert. "Do NCA Accreditation Standards Inhibit Innovation?," North Central Association Quarterly, vol. 47, no. 2, p. 255-58.

Study attempts to determine whether or not NCA standards for accreditation tend to stifle innovations in member schools.

"Basic Policies for Accreditation," Educational Record, vol. 53, no. 2, (Spring, 1972) p. 149-56.

A statement of basic principles of accreditation of selected health programs.

Carpenter, James L. "Accreditation, Evaluation and Institutional Change," North Central Association Quarterly, vol. 45, no. 2, (Fall, 1970)p.259-63.

Chalmers, John. "An Institutional Perspective on Accreditation in Higher Education," Learning Today, vol.5, no. 3, (Autumn, 1972)p. 50-57.

The paper assesses accreditation from the institutional point of view; whether it has been worth the time, effort, and cost to the colleges and universities.

Dickey, Frank G. The 1970's: Time for Assessment in Accreditation. Annual Report of the Executive Director, National Commission on Accrediting. Washington: National Commission on Accrediting, March 1970.

Dickey, Frank G. Shared Responsibility in Accreditation. Annual Report of the Executive Director, National Commission on Accrediting. Washington: National Commission on Accrediting, 1971.

Dickey, Frank G. "The Social Value of Professional Accreditation," Journal of the American Medical Association, vol. 23 (July 17, 1970), p. 592.

Dickey, Frank G. and Miller, Jerry W. A current Perspective on Accreditation. Report No. 7 Washington: American Association for Higher Education, Nov. 1972.

This paper sets in perspective the evolution of accreditation trends in the U. S. and considers present concerns about accreditation. The authors examine the impact of social change on accreditation, ways professions have influenced educational programs and institutions through accreditation procedures, the influence of the courts on the role of accrediting agencies in society, and federal involvement in accreditation. The authors conclude that unless accrediting agencies are able to reinvigorate the accrediting process, with emphasis on national welfare, the public could insist on other means of external monitoring of higher education.

Dickey, Frank G.; Miller, Jerry W. "Federal Involvement in Nongovernmental Accreditation," Educational Record, vol.53, no. 2, (Spring,1972) p. 138-42.

Accrediting agencies are caught between the problems of increased government control of practices on the one hand, and the risk of being charged with social irresponsibility on the other.

Dolff, Helmuth. "Can the Volkshochschulen of Today Answer the Requirements of Adult Education for Tomorrow?," Convergence, vol. 5, no. 3, (1972) p. 31-36.

Discusses the integration of adult education into the general system of education on an equal footing with the so-called traditional sectors of school and university.

Elliott, Lloyd A. Accreditation or Accountability: Must We Choose? Paper delivered at the meeting of the Middle States Association of Collegiate Registrars and officers of Admission, December 1970.

The author believes the machinery of accreditation has outlived its usefulness. This paper examines the effects of present accrediting activities and the work of regional associations and professional societies on part-time and continuing education. Part-time and continuing education has long been discouraged by the prestigious universities, though the notion of full-time faculty, full-time students, and the community of scholars has in actuality become a myth. Yet these myths are being perpetuated by accrediting teams who have encouraged practices directed against continuing education. Accrediting groups have pressed for greater emphasis on standardized tests for admission, increased efforts at recruitment, broader geographic representation and more financial aid, all aimed at admission and retention of the full-time student. The Commissioner of Education in New York State has proposed the "external degree" which, if accepted, would provide much of the flexibility needed to respond to today's problems and to the demands that our society is making on higher education. Voluntary agencies do not have the authority, nor can they respond quickly enough to the crises faced by higher education, and there is great need for regulation of the educational enterprise by a new administrative agency of the Federal Government.

Fetterhoff, Willard M.; Rodgers James E. "Schools/University Cooperation in NCA Evaluations: Two Approaches," North Central Association Quarterly, vol. 47, no. 3, (W. 73), P. 291-94.

Discusses the specific objectives of a program designed to assist junior and senior high schools in their preparation for North Central Association evaluations.

Grimm, Karen L. "The Relationships of Accreditation to Voluntary Certification and State Licensure," Part II--State Working Papers, Accreditation of Health Education Programs. Washington: Study of Accreditation of Selected Health Educational Programs, copyright, National Commission on Accrediting, 1971, pp. I-41 - I-42.

Kaplin, William A. "The Law's View of Professional Power: Courts and the Health Professional Association." Part II: Staff Working Papers, Accreditation of Health Educational Programs. Washington: National Commission on Accrediting, 1972.

Legal analysis of the relationship of accreditation to licensing and credentialing the health field.

Kaplin, William A. "The Marjorie Webster Decisions on Accreditation," Educational Record, 52 (Summer 1971), p.223.

Legal analysis of the implications of the Marjorie Webster decisions. Discusses the possibility that the Court of Appeals decision is not determinative of the issue of whether proprietary institutions can be admitted to membership in the regional accreditation associations.

Kaplin, William A., and Hunter, J. Philip. "The Legal Status of the Educational Accrediting Agency: Problems in Judicial Supervision and Governmental Regulation," Cornell Law Quarterly, 42 (1966), p.104.

One of the few articles ever written on the legal status of the private accreditation association. Discusses applicability of due process, antitrust, and monopoly power theories to accreditation associations.

Kells, Herbert R. "Institutional Accreditation: New Forms of Self-Study," Educational Record, vol.53,no.2 (Spring, 1972)p.143-48.

Author details six new self-study approaches that focus on current problems and opportunities and that could mean the survival of an institution.

Knowles, Asa S. "A Report on Institutional Accreditation in Higher Education," North Central Association Quarterly, vol. 45, no. 3 (Winter, 1971), p.279-91.

Koerner, James D. The Case of Marjorie Webster Junior College. Unpublished Ph.D. dissertation, 1969.

Koerner, James D. The Parsons College Bubble.
New York: Basic Books, Inc., 1970.

Discusses how the Accreditation Association closed down Parsons College. Critical analysis of the procedures the accreditation associations use.

Koerner, James D. "Preserving the Status Quo: Academia's Hidden Cartel," Change, vol. 3, no.2 (March/April, 1971), p.50-54.

The nation's educational accrediting agencies no longer serve the public interest; nonetheless they wield enormous power over academic institutions.

Pfnister, Allan O. The Future of Voluntary Accreditation. Presentation at the Annual Meeting of the Association of American Colleges, San Francisco, January 16, 1973.

In the present paper, the author restricts himself to three major questions regarding accrediting of colleges and universities: (1) Ought there to be some form of accreditation, voluntary or otherwise? (2) If there is to be some form of accreditation, what is the future of voluntary associations in this effort? and (3) If there is to be some form of accreditation and if not by voluntary associations, then by whom or what? The arguments presented to the first question seem to deny that accreditation as it now exists should be allowed to continue. Reasons for this feeling center around the facts that: (1) Very few colleges have any trouble at all getting themselves accredited, regardless of the quality of educational output; (2) The pursuit of excellence is not advanced by accrediting procedures; (3) There is no further need for accrediting agencies because only 80 nonregionally accredited institutions are in existence; and (4) Accreditation merely contributes to educational sameness between and among institutions rather than promoting quality education. Discussions of the arguments surrounding the other two questions are considered in the text of the document.

Pfnister, Allan O. "Regional Accrediting at the Crossroads," Journal of Higher Education, vol 47 no.7 (October, 1971) p.558-73.

Author states that regional accrediting agencies need to establish new boundaries of general accreditation responsibilities to respond to new issues and problems.

Presswood, Robert E. "Progress on Accreditation," Home Study, No. 2 (December, 1970),p.11-12.

Procedures of Accrediting Education in the Professions: A Series of Reports Issued by the National Commission on Accrediting. Washington: National Commission on Accrediting.

Puffer, C.E.; Steffeur, H.W., Lowbardi, J. and Pfnister, A.O. Regional Accreditation of Institutions of Higher Education. A Study Prepared for the Federation of Regional Accrediting Commissions of Higher Education. Chicago: The Federation, 1970 . Duplicated.

This report was privately commissioned by FRACHE to evaluate its procedures and to recommend changes.

Richards, Milton. "Reaccreditation via Case Study Seminars: Report on a New Technique," North Central Association Quarterly, vol. 47, no. 2, p.251-54.

Reports the experience of a two-year community college which was originally accredited through the conventional method and was later permitted to substitute a mixture of conventional, case study, and innovative techniques for its reevaluation.

Selden, William K. "The Accrediting Game: Who Calls the Plays?," Liberal Education, vol. 58, no. 2, (May 1972), p. 240-46.

Selden, William K. Accreditation: A Struggle Over Standards in Higher Education. New York: Hayser and Brothers, 1960.

Although 12 years old, this report summarizes issues that continue to require attention.

Shaw, Max; Jordan, K. Forbis. "NCA Accreditation: Improving Education Through Evaluation," North Central Association Quarterly, vol. 45, no. 3 (Winter, 1971),p.320-22.

Study Commission on Accreditation of Selected Health Educational Programs. Commission Report. Washington: National Commission on Accrediting, 1972.

Ward, Charles F. The State of Accreditation and Evaluation of Post-Secondary Occupational Education in the U. S., Center for Research and Development, No. 12. Raleigh: Center for Occupational Education, 1970.

The most comprehensive study of occupational accreditation.

Wilkins, Theresa Birh. "Accreditation in the States." in Accreditation in Higher Education. Edited by Lloyd E. Blauch. Washington: U. S. Department of Health, Education, and Welfare, 1959.

Williams, Robert L. "Legal Bases for Establishment of Private Institutions of Higher Education," North Central Association Quarterly, vol. 44:3 (Autumn 1970), p. 291-298.

3.0 The Problem of Restraint of Trade

3.1 State Restraint

Carbone, Robert F. et.al. *Students and State Borders: Fiscal/Legal Issues Affecting nonresident Students*. ACT Special Report Number 7. Iowa City: The American College Testing Program, 1973.

This booklet discusses the fiscal and legal issues affecting nonresident students and contains a useful summary [illegible] the law affecting the residential status of students.

Glenny, Lyman A. *State Government and Control of Higher Education*. Paper presented at American Educational Research Association Annual Meeting. New York, February 1971.

This paper reviews briefly recent developments in the organizations designated by various states to coordinate or govern public colleges and universities. The intent is to present the outline of a model that comprehends the universe of post-secondary education more fully and with the possibility of more effectiveness than do models now employed.

Harris, Sam P. *State Departments of Education, State Boards of Education, and Chief State School officers--Including Reference to Legally Created Statewide Coordinating Agencies for Higher Education*. Washington: U. S. Government Printing Office, 1973.

This report is an updated version of an earlier report--*State Education: Structure and Organization*. It is designed for use by State Education Agency personnel, by Office of Education staff concerned with providing leadership or services to the several states in improving the education enterprise, by national education organizations, by students of State School Administration, and by other individuals and organizations. This work is primarily concerned with the present overall administration and organization of the Central Education Agencies in the 50 states, the District of Columbia, American Samoa, Guam, The Commonwealth of Puerto Rico, The Trust Territory of the Pacific Islands, and the Virgin Islands. The compilation contains a description of the legally created state coordinating or governing agency for public higher education and narrative and tabular summaries of pertinent data of the State Education Agencies, State Boards of Education, and Chief State School officers.

Higher Education in the States, Vol. 3, No. 3, (October), 1972.

This issue contains the annual report prepared by the Education Commission of the States on State Legislative actions. Final summaries for 1972 are included for most states and status summaries for those still in session at the time of publication. References appear for all 50 states including 34 reports, 8 states that were reported in a previous issue, and 8 states with no 1972 legislative session.

"Model Legislation on Student Residency," Higher Education in the States, Vol. 2, no. 3 (April 1971), p.41-43.

Because of the radical variance in residency requirements from state to state and sometimes from institution to institution, and because of several court cases involving this issue, the Education Commission of the States appointed a committee to develop (1) a statement of principles for consideration in drafting legislation in connection with student residency and (2) sample model legislation incorporating these principles. The basic principles include: (1) Setting basic qualifications for attaining residency status that reflect the basic qualifications of legal age and length of domicile in the state required of voters in that state; (2) Providing a procedure whereby students who do meet these qualifications can earn residency status even though they may be currently enrolled; and (3) Authorizing governing boards or other concerned agencies to enter into reciprocal agreements with similar agencies in other states for the exchange of students across state lines. The model legislation includes sections on: legislative intent; definitions; presumptions and rules for determination of status; regulations and appeal; waiver of tuition; quotas, standards, etc.; reciprocal agreements; and repeals.

New Directions in Statewide Higher Education Planning and Coordination. Proceedings of the Southern Regional Education Board Legislative Work Conference, Hilton Head, South Carolina, September 1970.

(cont'd.)

Williams, Robert L. *Legal Bases of Coordinating Boards of Higher Education in Thirty-Nine States.* Chicago: Council of State Governments, 1967.

To determine the essential provisions of the legislation or constitutional statements regarding the coordinating boards of higher education functioning in 39 states, findings of a mailed survey are tabulated. This survey determined the official title of the board of each state, composition of its membership, whether its authority is advisory or managerial, methods of allocating appropriations, action regarding capital outlay and budget requests, responsibility for new programs, and establishment of master plans. Descriptive reviews outline specific provisions for the states of Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wisconsin.

4.0 The Problem of Faculty Resistance (Tenure, Collective Bargaining, and Technological Unemployment)

Blair, James W., Jr. (ed.) ASG Series in Student Rights and Responsibilities, Vol. 1. Cincinnati: The Associated Student Governments, 1968.

Contains articles on the relationship of the student to the university and on procedural due process.

Brubacher, John S. The Courts and Higher Education. San Francisco: Jossey-Bass Publishers, Inc., 1971.

Author uses detailed case studies and their accompanying judicial opinions to present the essence of the legal aspects of higher education. Areas of discussion include racial equality, military status of students, censorship of student publications, faculty tenure, conflict of interest, loyalty oaths, relationships with the church, relationships with private business, academic freedom, accreditation, etc.

Brubacher, John S. "The Impact of the Courts on Higher Education," Journal of Law and Education, vol. 2, no. 2 (Spring, 1973)p. 267-282.

Examines recent court cases to see how they affected the direction and purpose of the university. The author finds that the courts are protecting rather than threatening the autonomy of universities.

Buckey, Dianna Z. Hoffman. "Tenure in the University of California--A Denial of Due Process?" University of California at Davis Law Review, Vol 5 (1972), p.593.

A good review of the due process issue in the faculty employment relationship.

Byrnes, James C. and Tussing, A. Dale. The Financial Crisis in Higher Education: Past, Present, and Future. Syracuse: EPRC Publications, 1971.

American higher education, according to the authors, is facing a financial crisis that can be alleviated only by drastic, increased federal support to the educational system. Presented in this document is a review of the financial history of American colleges and universities, a look at the present situation, and a preview of the future picture of higher education. Following the past, present, and future review is a discussion of whether a federal role in financing is implied. How much aid should be appropriated, and what form this aid should take. It is suggested that the Federal Government adopt a financial aid program that would combine institutional and student aid. An institutional grant and student loan program is offered as one major alternative.

Canavan, Francis. "The Process that is Due," Journal of Higher Education, vol. 44, no. 2 (February, 1973, p.114-123.

Explains the term "due process: and its implications in academic institutions.

Cartter, Allan M. et.al. The Economics of Higher Education. Princeton: College Entrance Examination Board, May 1967.

This publication contains papers presented at a colloquium held by the College Scholarship Service in 1965. The papers deal broadly with the question of the most effective methods of financing higher education, and with the role and problems of the educational consumer. The papers deal with--(1) The economics of higher education, (2) Pricing problems for higher education, (3) Student diversity and national goals in higher education, (4) Investment in higher education and its returns, (5) The federal interest in educational opportunity, (6) Higher education--state and local governments, (7) Aiding higher education through income tax credits, (8) An argument against tax credits in higher education, (9) Long term credit--implications for colleges and universities, (10) Monetary policy and the financing of higher education, and (11) The Government and student financial aid.

Chambers, M. M. The Colleges and the Courts: The Developing Law of the Student and the College. Danville, Illinois: The Interstate Printers and Publishers, Inc., 1972.

A discourse focusing on the law of the relationships between the student and the college since 1965, including nearly 150 federal decisions and a roughly equal number of judgments of state courts. (Seventh in a series on The Colleges and the Courts by Chambers of the Department of Education Administration at Illinois State University.)

Chambers, M. M. The Colleges and the Courts, 1946-50. New York: Columbia University Press, 1952.

Author has assembled, analyzed, and interpreted, for a 5-year period, the numerous (190) judicial decisions relating to institutions of higher education.

Chambers, M. M. The Colleges and the Courts Since 1950. Danville, Illinois: The Interstate Printers and Publishers, Inc., 1964.

This volume digests and discusses the principal court decisions since mid-century affecting higher education in the U. S.

Clowes, Darrell A. "The Student-Institution Relationship in Public Higher Education," Journal of Law and Education, vol. 2, no. 1 (January 1973), p.127-136.

Examines the court influenced changes in student-college relationships. Finds that tests of regulations currently used by courts include such terms as "substantial justification," "appropriate reason," "chilling effect," or "prior restraint."

Commission on Academic Tenure in Higher Education. Faculty Tenure. A Report and Recommendations by the Commission on Academic Tenure in Higher Education. San Francisco: Jossey-Bass Publishers, 1973.

Corson, John J. "Institutional Governance Within A System," Educational Record, vol. 54, no. 2 (Spring 1973), p. 107-114.

Donoghoe, Diane C. "Emerging First and Fourth Amendment Rights of the Student," Journal of Law and Education, vol.1, no. 3 (July, 1972), p.449-467.

Edwards, Scott. "An Academic Chairman Looks at Governance," Change, vol. 4, no. 7 (September, 1972), p.24-29.

Author recommends that a labor-management relationship between faculty and administration would be more honest than the vagaries of the current relationship based on democratic pluralism.

Frankie, Richard J. "Legal Aspects of Authorization and Control in Junior College: A Summary (1936-1970)", *College and University*, vol. 46, no. 2 (Winter, 1971), p. 148-54.

Henry, David O. "Accountability: To Whom, For What, By What Means?," *Educational Record*, vol. 53, no. 4 (Fall, 1972), p. 287-292.

Addresses the question of whether it is possible for higher education to maintain institutional autonomy and academic freedom and at the same time be accountable for internal workings.

Henderson, Algo D. *The Role of the Governing Board* (First in a series entitled *Perspectives on Trusteeships*). Washington: Association of Governing Boards of Universities and Colleges, 1967.

A review of the origin, nature, legal status, and characteristics of governing boards and their relation with administrators and faculty.

Joint Committee on Higher Education. *Collective Bargaining; Professional Negotiations*. Washington State, January 1973.

The Joint Committee on Higher Education had as its mandate in this particular instance to reconcile the differences of procedures and rights relating to professional negotiations or collective bargaining between faculties of the various institutions of higher education within the state of Washington, and to conclude the study of the Professional Negotiations Act for Community Colleges. Thus, the Joint Committee recommends that: (1) The boards of regents and trustees of state universities and colleges may, in the exercise of their discretion, adopt rules to authorize and govern collective bargaining between such state colleges and universities and their faculties, after being requested to do so by a majority of members of their respective faculties; (2) The Community College Professional Negotiations Act should be amended by procedural changes to increase its workability; and (3) The decision to implement a state-wide salary schedule for community colleges should be deferred until the legislature makes a determination on the continued operations of the community college system under the Professional Negotiations Act.

Keck, Donald. "College Governance and Collective Bargaining," Today's Education, vol. 61, no. 9 (December 1972)p.51-2.

Collective bargaining provides the basis for the first really effective instrument of faculty power and participation in the decision-making process, because for the first time, faculty is able to come to grips with the real decision-making authority of the university.

Kerr, Clark. "Administration in an Era of Change and Conflict," Educational Record, vol. 54. no.1 (Winter 1973),p. 38-46.

The conflicts of today's academic world require a different method of educational management.

"Legal Aspects of Student-Institutional Relationships," Denver Law Journal, vol. 45, no. 4, Special Issue, 1968.

This special issue of the law journal of the University of Denver College of Law contains seven articles: 1) "Campus Freedom and Order," by Logan Wilson; 2) "Students, Higher Education and the Law," by Wm. Beaney; 3) "Who Are Members of the University Community?" by T. F. Lunsford; 4) "The Student as a Private Citizen," by Robert McKay; 5) "The Student as University Resident," by Wm. W. Van Alstyne; 6) "The Private-Public Legal Aspects of Institutions of Higher Education," by Wm. Cohen; 7) "The Student as a Student," by Phillip Monypenny.

Light, Mardsen, and Cort. The Impact of the Academic Revolution on Faculty Careers, Washington: American Association for Higher Education, 1973.

McConnell, T. R. Accountability and Autonomy. Paper presented at Invitational Seminar, "Restructuring College and University Organization and Governance," sponsored by the American Association of Higher Education, Airlie House 1971. Berkeley: Center for Research and Development in Higher Education, 1971.

In the last few years government agencies have expanded their controls over higher education and thus diminished the autonomy of public institutions. Some of the recent instances of government intervention were the responses of legislators and government officials to student and faculty behavior they considered irresponsible and disruptive. In other cases, financial stringency and mounting costs have provoked greater controls, indicative of long-range trends in government and public administration. In any event, educational institutions have found themselves accountable in manifold ways to the agencies of state government. As private colleges and universities secure state support, they too will find themselves publicly accountable. And as federal support of higher education grows, both public and private institutions will find themselves increasingly accountable to the federal departments that administer the funds as well as to the state agencies through which they are channeled.

Michael, Gregory E. "The Unitary Theory: A Proposal for a Stable Student-School Legal Relationship," *Journal of Law and Education,* vol. 1, no. 3 (July,1972), p.411-433.

Mills, Joseph L. *The Legal Rights of College Students and Administrators: A Handbook*. Washington: Lerner Law Book Publishing Co., Inc., 1971.

Book defines the legal rights of college students and administrators through an assessment of case law trends.

Mortimer, Kenneth P. *Accountability in Higher Education*. Washington: American Association for Higher Education, 1972.

This paper is an overview of accountability in higher education. Chapter 2 considers 3 major contexts for the term accountability: Managerial accountability; Accountability versus evaluation; and Accountability versus responsibility. Chapter 3 examines the increasing pressures to be more accountable to external forces; *i.e.*, executive agencies, and the public. Chapter 4 covers the question of accountability with institutions themselves. Three major difficulties in assessing internal accountability are presented: (1) The weaknesses of academic authority result in increased pressures to codify the faculty-administrative relationship; (2) Lack of clearly defined goals and objectives are frequently matched with proposals to hold institutions more accountable through certain management techniques and by increased emphasis on student learning; (3) Organizational complexity of colleges and universities often results in proposals for decentralized decision-making structures that are not sufficiently aware of legitimate demands for accountability. Chapter 5 considers some possible trends in accountability for the 1970's. An extensive bibliography on the literature concludes the report.

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Appendix H

REPORT OF THE COMMITTEE ON PROPRIETARY INSTITUTIONS, MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS, SEPTEMBER 18, 1974

BEST COPY AVAILABLE

THE REPORT OF THE AD HOC COMMITTEE ON PROPRIETARY INSTITUTIONS TO THE BOARD OF TRUSTEES OF THE MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS

July 3, 1974

COMMITTEE MEMBERS

R. Lee Hornbake, Vice President for Academic Affairs, University of Maryland System; Chairman of the Middle States Commission on Higher Education; Chairman of the Ad Hoc Committee on Proprietary Institutions

Frank P. Piskor, President, St. Lawrence University; Former Chairman, Middle States Commission on Higher Education

Joseph P. Sabo, Principal, Watchung Hills Regional High School (N.J.); Second Vice Chairman, Middle States Commission on Secondary Schools

Calvin L. Crawford, Executive Secretary, Middle States Association

William H. Etsweiler, Jr., Executive Secretary, Commission on Secondary Schools

Harry W. Porter, Executive Secretary, Commission on Higher Education

This report, with its recommendations, was developed with the advice of Association Counsel. It will be presented to the delegates for discussion and action at the Annual Business Meeting of the Association in Washington, D.C., Thursday afternoon, December 5th, 1974.

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THE REPORT OF THE AD HOC COMMITTEE ON PROPRIETARY INSTITUTIONS TO THE BOARD OF TRUSTEES OF THE MIDDLE STATES ASSOCIATION OF COLLEGES AND SECONDARY SCHOOLS

SECTION I – BACKGROUND OF THE MIDDLE STATES ASSOCIATION POLICY ON NON-PROFIT OR PUBLIC INSTITUTIONAL MEMBERSHIP

A – General History

The earliest formal statement to the effect that proprietary institutions would not be considered for Middle States accreditation occurs in the 1928 report of the Chairman of the Commission on Higher Education at the annual meeting. It should be remembered that many other categories of higher educational institutions were excluded from consideration at that time. The issue of the proprietary "nature" of higher education institutions was raised in the context of junior colleges and of standards for their accreditation. In the course of his report, the chairman commented, "The fact that a number of the junior colleges are porprietary in character raises another serious difficulty."

Two years later, under similar circumstances, the Chairman noted, " . . . it would appear under the rules that proprietary junior colleges were not eligible for inclusion in the approved list."

The Commission on Secondary Schools initially accredited at least two proprietary schools, Franklin School (1928) and Dwight School (1928) in New York City. There is no record that the proprietary character of these schools was a topic of discussion by that Commission.

Throughout the 1920's and 1930's there were a number of institutions which held membership in the Association although they were not accredited. This "other membership" category included schools and colleges which were moving toward accredited status; schools and colleges which had been denied accreditation; schools and colleges which had been removed from accredited status; and institutions which were not eligible for accreditation, including proprietaries.

It was not until 1945, when the "other membership" category was eliminated, that accreditation and membership became intertwined as mutually inclusive conditions. In 1949 the Commission on Secondary Schools accredited another proprietary school, the Rhodes School, but again there is no indication that discussion on the proprietary character of the school took place. In 1972, with advice of counsel, the number of proprietary secondary institutions was increased to four by applying the normal merger-division rules when a member proprietary school established an operationally separate unit.

B – The 1957 Preliminary Report of the Special Committee on Membership.

The chairman of the committee, Albert E. Meder, Jr., read a paper reporting on the deliberations of the special committee. This report represented the first detailed documentation of the considerations which were operative at that time and presumably in previous years as well.

In the words of the report:

> The committee believes that there are certain elements so built in the structure of proprietary institutions as to mitigate against the excellence we seek for accreditation . . .

Among the objections cited were these:

> A proprietary institution does not devote all of its resourses to the welfare of its students and the upbuilding of its programs.

> There is an inherent lack of continuity in the policy and program of a proprietary institution.
>
> There is a concept of ownership that either in itself undermines, or is a constant threat to undermine, the proper relationship of the teachers or faculty to the institution. The faculty must surely be regarded only as employees whom the owner can engage and dismiss at will.

In addition, the Chairman indicated that the accreditation of proprietary institutions would not further the development of sound educational policy.

C – The Marjorie Webster Decision

The Court of Appeals decision in the *Marjorie Webster* case pointed to the following:

1 - where non-profit association membership is prerequisite to professional practice etc., the courts will review those membership standards;

2 - standards for membership must be administered with an even hand and not be in conflict with public policy;

3 - deprivation of economic or professional advantages may warrant judicial intervention;

4 - the extent to which the professional judgement of the Association in setting standards for membership may prevail is limited by potential harm and fairness of the procedures employed;

5 - the opportunity for judicial review is enhanced when the effect of the application of the standards is limited;

6 - while the burden of proof rests on the aggrieved, if it can be established that due process has been violated, judicial intervention is likely;

7 - Middle States' limitation of its membership to non-profit and public institutions was not so unreasonable as to require judicial intervention.

D – The Immediate Issue

Since the *Marjorie Webster* decision there had been, prior to the designation of this committee, no formal consideration given to altering the Association's membership regulations or a review of the consequences of such an action or of the failure to act.(1) In early 1974, however, a request for consideration was made to the office of the Commission on Higher Education by a state recognized (chartered) four-year, degree-granting proprietary institution. In response to this request, it was agreed that the Middle States Association Board of Trustees (and the Commissions) would study the matter of the accreditation/membership of proprietary institutions and adopt a schedule for that study which would permit adequate internal review and a recommended course of action to the membership of the Association at the December 1974 annual meeting. These arrangements and schedule were communicated to the institution making the request.

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(1) See footnote in Section III, page 12.

SECTION II – CURRENT TRENDS RELATED TO THE MATTER OF PROPRIETARY INSTITUTIONS

A – Proprietary Institutions in the Middle States and Elsewhere

A recent survey undertaken at the direction of the Commission on Higher Education indicates that there are approximately 1,000 post-secondary proprietary institutions in the Middle States region. Among these are five or six institutions which conceivably could apply to the Middle States Association for accreditation and membership.

The 1972-73 edition of the H.E.W. Education Directory, *Higher Education*, lists some 2,600 higher institutions in the United States as meeting the following criteria:

1- accredited by a nationally recognized accrediting agency, or approved by a State department of education or by a State university;

2- hold pre-accredited status with designated nationally recognized accrediting agencies;

3- have their credits accepted by three institutions accredited by nationally recognized accrediting agencies.

The directory lists only thirty proprietary institutions among these higher institutions. Two of these are accredited by the Western Association and twenty-two by one of two specialized accrediting agencies. Six of these institutions have no accreditation.

Although specific and conclusive data are not available, it is unlikely that proprietary secondary schools which are state approved and have diploma granting authority exist in any great number in the Middle States area.

A recent study reported in *Research Currents* (ERIC Higher Education), on proprietary and public vocational students being conducted by Willford W. Wilms of the Berkeley Center for Research and Development in Higher Education cites a figure of 10,000 proprietary vocational schools currently in operation in the United States.

Excerpts from this report include the following:

> .... Cosmetology, or "beauty", schools represent a third of the total number; trade and technical schools another third; and the business plus the correspondence schools make up the final third. Although correspondence schools represent less than a tenth of the proprietaries, they enroll two-thirds of the students and produce over half of the industry's income.
>
> .... Today 85 percent of the proprietaries are owned by well-known corporations such as Bell and Howell, Control Data, Minneapolis Honeywell, I.T.&T., and others ....
>
> Academic and business interests have merged in the past decade, with each nearly reversing its former direction. As academic education encountered rough fiscal sailing, it adopted many practices and hired personnel from the business sector. It paid increasing attention to recruiting students, hoping for an excess of income over expenditures. On the other hand, many proprietary schools have made a bid for "respectability" to attract more students and federal student aid funds. In doing so, they have become concerned about accreditation, transfer of credit, and degree granting status issues that lay outside the pale of profitmaking schools 10 years ago.

Among the contemporary studies and reports on higher education, the "Newman" reports have been singled out as being of particular interest and concern to those involved in accreditation. The second Newman report, *National Policy and Higher Education*(1) contains several references to the matter of the accreditation of proprietary institutions.

The Newman report states that:

> Today the spectrum from research university to proprietary vocational school is close to continuous, and a new term, "Post-secondary education", has come into use to encompass the broader range of institutions, difficult as it is to fix the limits of that term.
>
> As community colleges developed, encompassing both liberal arts from the traditional college and vocational studies from the vocational or technical schools, the old distinction began to blur. The acceptance of the community college as "college" has led, in turn, to a new opportunity for legitimacy for proprietary schools. It is difficult to see why someone should not be a legitimate "student" while studying computer programming at a proprietary school if someone else is a "student," counted in the national statistics and eligible for state or federal student aid, because he is studying computer programming at a community college. Both types of institutions have been growing rapidly -- much more rapidly than the traditional four-year colleges and universities. Today there are more than 1,100 community college campuses with over two and a half million students and more than 10,000 proprietary schools enrolling almost two million students.

Later on the report states:

> ... yet too often licensing and professional accreditation develop into an entanglement of arbitrary rules and procedures which undermine individual opportunity, erode institutional flexibility, subordinate protection of the consumer, and give rise to major social inequities.

As part of the agenda for reform, the Newman report calls for increased recognition of, and legitimacy for, the role proprietary, industrial, cultural, and community organizations can play in providing post-secondary education.

In addition, the recent study of the Middle States Association conducted for us by Arthur D. Little, Inc. suggests that the Middle States constituency favors increased consideration of proprietary institutions and their programs for accreditation and related educational services. Approximately 65% of the questionnaire respondents from both secondary and postsecondary education tended to favor, or strongly favored, activity in this area.

B – Policies of Other Regional Associations

1- Secondary Schools

a. New England Association of Schools and Colleges:

Independent Schools – no members or candidates currently; it does not seem that there would be many proprietary schools which would seek affiliation perhaps up to 10 or 15; there are no formal barriers to the consideration of proprietary schools.

---

(1) The quotations are taken from pages 8 and 72 of the prepublication copy of *National Policy and Higher Education*, a report of a special task force to the Secretary of Health, Education and Welfare, October 1973.

Vocational-Technical Schools -- no members or candidates; the only anticipated activity would come from post-secondary institutions. There are no barriers to consideration. However, the recognition extended by the U.S. Commissioner of Education specifies "public and private non-proprietary institutions".

b. Southern Association of Colleges and Schools:

There are 10 member proprietary schools (military) and no more than 10 or so which might seek affiliation. There are no formal barriers and normal standards would be applied.

c. North Central Association of Colleges and Secondary Schools:

There are no candidates or members and no information on potential members. There are no formal barriers to membership.

d. Northwest Association of Secondary and High Schools:

There are no members or candidates; there have been inquiries but there is no knowledge of the number which might seek affiliation. There are no formal or constitutional barriers.

e. Western Association of Schools and Colleges:

Three to five current members are probably proprietary. No special effort is made to determine proprietary nature other than to ask them. There is no knowledge of potential members; there appears to be little interest and no inquiries. There are no formal or constitutional barriers.

2- Higher Institutions

a. New England Association of Schools and Colleges:

The Association is in the process of determining the candidacy status of Arthur D. Little Management Education Institute, Inc., which offers a state recognized Master's degree program in management.

b. Western Association of Schools and Colleges:

Two proprietary institutions are in candidacy status with future apparently uncertain. There are other possible affiliations, such as a proprietary law school. There are two proprietary members (accredited).

c. Southern Association of Colleges and Schools:

There are no members or affiliates but the Association's constitution has been changed to permit recognition of proprietary institutions.

d. North Central Association of Colleges and Secondary Schools:

There are no members or affiliates. There are no formal or constitutional barriers to affiliation.

e. Northwest Association of Secondary and Higher Schools:

There are no members or affiliates. There are no formal or constitutional barriers to affiliation.

C – The Federation of Regional Accrediting Commissions of Higher Education

The Commission on Higher Education of the Middle States Association, as well as similar commissions of the other regionals, has been influenced by the policy decisions of FRACHE. In October 1972, the Federation proposed a new eligibility policy which removed the non-profit standard from the list of eligibility criteria, but which was the subject of a moratorium after July 1973. The Federation continues to discuss this question (see E. below and footnote in Section III, page 12).

D – National Commission on Accrediting

The National Commission on Accrediting was established on a national level in 1949 by colleges and universities for the primary purpose of serving as a coordinating agency for accreditation activities in higher education. The Commission does not itself perform an accrediting function, but recognizes specialized agencies which grant program accreditation. The Commission relies upon the college commissions of the regional associations to grant institutional accreditation. Some of the specialized agencies deal primarily with proprietary institutions, particularly the National Association of Trade and Technical Schools, the Association of Independent Colleges and Schools, and the National Home Study Council. (see E. below)

E – Council on Postsecondary Accreditation

A merger of FRACHE and NCA has been approved by the boards of both organizations. The new entity, COPA, is expected to become operational in 1975. It is the expressed hope of those involved in the merger negotiations that the new organization will provide an "accredited status" umbrella under which all eligible postsecondary educational institutions may achieve appropriate recognition (accrediation). However, it will still remain for the Middle States Association and the other regionals to consider for membership those proprietary colleges and schools which seek regional accreditation.

F – New York State

The State Education Department of New York has been in the forefront of state activity directed at the recognition of the educational programs offered by postsecondary proprietary institutions. In New York, profit making schools are incorporated under the Secretary of State and are subject to evaluation for licensure or registration under the standards for quality promulgated in the Regulations of the Commissioner of Education.

Formal recognition dates to 1970 when the Regents, after consultation with representatives of proprietary institutions and public and non-profit colleges, approved the principle and concept of degree powers for qualified proprietary institutions. The Regents chose not to create a degree designation exclusively for the use of proprietary institutions, but to add one more, the Associate in Occupational Studies. The degree requires no general educational component. New York's position of approving individual programs, rather than the entire institution, permits proprietary institutions to offer their students a variety of opportunities. However, at degree granting institutions, all curricula are subject to evaluation. Separate criteria and standards have been established for different types of educational endeavors. In the first year of evaluations (1971), 20 institutions were authorized to award the A.O.S. degree and one 4-year institution was authorized to award a Bachelor of Fine Arts.

G – The U.S. Office of Education

The Accreditation and Institutional Eligibility Staff of the Office of Education, pursuant to legislation, recognizes the several accrediting agencies and associations which have been determined to be reliable authority as to the quality of education and training offered by educational institutions. The Office publishes the criteria used in recognizing both national and state agencies, some of which accredit proprietary institutions almost exclusively. It is the policy of the office to encourage the expansion of voluntary accreditation activity both in terms of numbers of institutions served and in terms of types of institutions. Operationally, these policies do not restrict the number of accrediting agencies which may meet the criteria except that, in general, only one agency will be recognized to operate in a particular program area.

The AIE staff has recognized and evaluated each of the regional college commissions, as well as at least one regional secondary commission.

H – Pending Federal Legislation

Legislation appears to be under consideration which would provide protection against, and compensation for, damages resulting from the operation of "wrongly accredited" institutions, and to provide for the "strengthening" of the criteria by which post-secondary educational institutions gain accreditation or approval.

I – 1202 Commissions

Increased concern on the part of the Federal government about the role of proprietary institutions in post-secondary education is shown by Section 1202 of the Education Amendments of 1972, Public Law 92-318 (June 23, 1972). Under that legislation any state desiring financial assistance for comprehensive inventories of, and studies with respect to, public and private post-secondary educational resources in that state, must establish a Commission or designate an existing State agency or Commission as such. This Commission must be "broadly and equitably representative of the general public and public and private non-profit and proprietary institutions of post-secondary education . . . including . . . community colleges . . ., junior colleges, post-secondary vocational schools, area vocational schools, technical institutes, four-year institutions of higher education and branches thereof." Such a Commission may be used to submit State plans in order that a State receive Federal community service grants, financial assistance for improvement of undergraduate instruction, and grants for construction of undergraduate academic facilities. In recommending the legislation the House Education and Labor Committee emphasized H. R. Rep. 92-554 (Oct. 8, 1971) that:

> *** To be effective, such (State) planning must embrace the full spectrum of postsecondary public, private, and proprietary educational activities . . . .

Fifty-five political units are eligible to establish or to designate 1202 commissions. To date, forty-seven have done so, including: Delaware, Maryland, New Jersey, New York, Pennsylvania, the Commonwealth of Puerto Rico and the District of Columbia.

J – Internal Revenue Service

Two recent IRS revenue rulings were considered by the committee as relevant to this study and to their recommendation.(1) The first was addressed to FRACHE; the second, to the Southern Association.

In its August 29, 1973 (FRACHE) ruling, IRS ruled, in part, that:

> 1. The accreditation of proprietary schools by your constituent commissions will not adversely affect your status under section 501 (c) (3) or section 509 (a) of the Code:

---

(1) see footnote in Section III, page 12.

2. The admission of proprietary schools that qualify for accreditation to membership in the regional associations will not adversely affect your status under section 501 (c) (3) or section 509 (a) of the Code;

3. The admission to your membership of the accrediting commissions of the three organizations . . . who deal with predominantly proprietary educational institutions will not adversely affect your status under section 501 (c) (3) or section 509 (a) of the Code.

In its ruling, dated April 1, 1974 (Southern Association), IRS stated that membership by proprietary institutions in the Southern Association would not affect adversely that Association's tax-exempt status as an educational organization. In making that ruling, however, IRS stated:

> a. *** Neither its (the Association's) charter nor its bylaws prohibit the accreditation and membership of proprietary schools (educational facilities operated for profit). However, there are a very few proprietary schools in the region and these have been, on application, accredited and approved for membership in the organization. Such schools represent a small minority of the members of the organization.
>
> b. *** Any private benefit that may accrue to the few proprietary members because of accreditation is incidental to the purpose of improving the quality of education.

SECTION III – THE COMMITTEE ON PROPRIETARY INSTITUTIONS(1)

A – The Charge to the Committee

The Committee on Proprietary Institutions was appointed by the President of the Association, E. K. Fretwell Jr., following a special meeting of the Association and Commission officers and staff which was held on February 12, 1974. That session had been convened to discuss the background, issues and recent indications of the continuing concern and desire on the part of certain proprietary educational institutions to establish a membership or other affiliation with regional accrediting associations in general and with the Middle States Association in particular. The Association and Commission officers at that time resolved that:

> The President shall appoint a special committee of the Association, consisting of 3 to 5 members to carry out the following duties:
>
> a - Study and define alternatives available with respect to proposed membership in MSA by proprietary institutions of higher education and secondary schools.
>
> b - Recommend a procedure for having the Commissions, Board, and Association membership consider these alternatives so that
>
> (1) appropriate recommendations may be made prior to the meetings of the Commissions now scheduled;
>
> (2) recommendations, if any, may be presented to the general membership at the next annual meeting.

---

(1) A predecessor *ad hoc* committee (on the Non-Profit Criterion) met on March 26, 1973 in response to the FRACHE revision of eligibility conditions. The committee chose to make no recommendation since the IRS had not yet resolved the question of tax exemption status. Much of the material assembled for that committee was reviewed by the present committee.

B – The Need for a Decision by the Middle States Association

The most important gain that the Association realized from the *Marjorie Webster* decision was the time necessary to make a careful review of its position on the non-profit membership criterion of eligibility, and to come to a decision based on the contemporary developments in education. The Association, under its present legal organization, cannot permit other groups to make policy for it in this area.

C – The Deliberations of the Committee

This special committee on the regional accreditation of proprietary institutions was authorized on February 12, 1974 by the Executive Committee of the Middle States Association, as has been stated. Its members were named shortly thereafter.

By February 28, 1974, the Executive Secretary of the Association, Calvin L. Crawford, had prepared or assembled pertinent background information including a general history of the proprietary exclusion, a 1957 position paper on Association membership, pertinent Internal Revenue Service rulings, New York State's Policy and Practice with regard to Post-Secondary Proprietary Institutions, and the U. S. Department of Health, Education and Welfare publication, *Nationally Recognized Accrediting Agencies and Associations.* With these materials in hand, it was feasible to concentrate the committee's attention on its major assignment at an early date.

The Committee has met to date on four occasions: March 15 (District of Columbia), May 20 (District of Columbia), May 31 (Newark), and June 13 (District of Columbia). The Association's counsel, Courts Oulahan, Esq. was present at all meetings. The May 20 meeting was not considered a meeting of the full committee.

Of particular concern to the Committee were the issues of (1) the constitutional status of the prevailing practices of the Association with respect to proprietary institutions; (2) developments between and among accrediting agencies at the national level and the projected potential of these developments; (3) the scope of the proprietary constituency which might seek membership in the Association; (4) the feasibility of evaluating proprietary institutions within the extant policies and procedures of the two Commissions; (5) financial considerations and, most importantly, the tax exempt status of the Association; (6) developments and concerns of a similar nature in other regional accrediting associations; and (7) alterations in the Association's By-Laws in the event proprietary institutions were to be recommended for membership.

The Committee, with representation from both Commissions, considered all of these components as matters of mutual concern. The Committee recognized, however, that the greater impact of developments in education, as they converge on accreditation, have been and will be felt by the post-secondary sector.

The advice of the Counsel has been fundamental to the deliberations of the committee. There is no assurance that action of any sort on the part of the Association, or the absence of action, will preclude litigation. However, the committee has sought to reach a rational objective within the long-established principles of the Association, without introducing new or additional possibilities of legal action. On the topic of the feasibility of evaluating proprietary institutions, advice was obtained from the Academy for Educational Development, Inc.

The report which has emerged is a consensus statement on the part of committee members

D – The Alternatives Open to the Committee

1. Maintenance of Status Quo

It has been the policy of the Middle States Association to limit its membership to public and non-profit institutions. The only variation of this policy was with respect to three private secondary schools in New York.

Because of their "grandfather" status, the eligibility for membership of these institutions was continued.[1] The validity of this policy was upheld in the *Marjorie Webster* case.

Your Committee believes that it would not be unreasonable, *per se*, for the Association to continue the foregoing policy. The possibility of legal challenge on the non-profit membership requirement, however, cannot be foreclosed. More important, recent developments in the field of education, particularly that of higher education, indicate that the Middle States Association should re-examine this policy. We believe this re-examination to be the duty of this Committee, acting in accordance with the Association's principal aim – the improvement of educational quality.

We do not criticize the policy of a non-profit membership. The extant policy has permitted the Middle States Association to develop accrediting philosophy and techniques which have improved not only the quality of its educational constituency but also, we believe, the quality of higher and secondary education in the Middle States area and throughout the United States.

2. National Proprietary Organization

We believe that the most appropriate solution to the legitimate educational goals of proprietary educational institutions would be the creation of a voluntary national accrediting organization recognized by the Office of Education. Such a development may well become reality in the future, and the Middle States Association should render every educational assistance to those groups and institutions which are or will be working on such a project. Such an organization can and should have the same educational standing and reputation as existing organizations now recognized by the Office of Education.

However, because we cannot see that such a development will occur in the near future, we recommend the alternative stated in (3) below.

3. Admission of Degree/Diploma Granting Proprietary Institutions

We believe that the time has come for the Association to consider appropriate means for expanding the bases for its membership to include certain proprietary institutions: institutions which have degree and diploma granting powers conferred upon them by appropriate State education agencies and which, referring to the institutions themselves, seek educational quality consistent with the aims of the Middle States Association. Such a modest but meaningful step by the Association to increase its educational responsibility to the public would not depart drastically from the Association's past and present efforts, and indeed, is consistent with the views expressed by the membership in the Arthur D. Little, Inc. survey. We propose that the membership be expanded to include proprietary institutions with degree and diploma granting authority. Further qualifications, cited later, include (1) an institution with a governing board which includes a membership broadly representative of the public interest; and (2) an institution which devotes all, or substantially all, of its gross income to educational purposes. We would not expect that such institutions would differ significantly in their educational operations from those of public or non-profit institutions.

We, therefore, propose the following amendment to the Association's By-Laws. The standards set forth in this proposal already are applicable to our present membership and would be applied with equal fairness to both proprietary and non-proprietary institutions.

E – Proposed Revised Article III, Section 2 of the By-Laws

Section 2: Institutional Membership

Any institution of higher or secondary education accredited by the appropriate commission, or any unit of such institution classified as operationally separate and accredited by the appropriate commission, will be received into active membership upon payment of the annual membership dues, provided such institution meets the following minimum standards:

---

[1] In 1973 a branch of one of these institutions was accredited, again consistent with the "grandfather" status of the parent organization.

a. The institution has a charter and/or formal authority from the appropriate governmental agency to award, in the case of institutions of higher education, a degree, and in the case of institutions of secondary education, a diploma representing satisfactory completion of secondary education.

b. The institution has a governing board which includes a membership broadly representative of the public interest.(1)

c. The institution devotes all, or substantially all, of its gross income to the pursuit of its educational purposes and programs.

F – Procedure

Because of the importance of the subject matter of our study, we believe that the entire institutional membership and both Commissions should consider our report and reach a decision in a meaningful exercise of the democratic process. Therefore, we propose that the following procedure be followed:

1. Each Commission should consider our report and make recommendations thereon before the special meeting of the Board of Trustees on July 21, 1974.
2. The agenda of the Board for the July 21, 1974 meeting should include consideration of our report and the recommendations thereon of each Commission.
3. The recommendations of the Board of Trustees, together with our report and the recommendations of each Commission, should be sent to the membership at the earliest possible date.
4. It is anticipated that copies of this document will be sent to all organizational members of the Middle States Association and other interested educational institutions, associations and agencies.
5. Meaningful and relevant written comments and suggestions received could then be printed for distribution to the membership as far in advance of the December 1974 meeting as possible.
6. At the annual membership meeting, provision should be made on the agenda for a debate on the proposal before a vote by the entire membership is held.
7. In this connection, Article XVI - Amendments, of the By-Laws, provides:

   > "In all instances involving amendments to the . . . By-Laws, notice of the proposed action must accompany the call to the meeting. Such notice must be sent to the membership at least thirty days prior to the meeting . ."

G – Conclusion

We welcome this opportunity to assist proprietary institutions of higher and secondary education to maintain and improve the quality of education without in any manner infringing upon the expertise of accrediting organizations which now serve proprietary institutions. Indeed, we anticipate appropriate cooperation with these organizations in the field of education. We do not intend, by our recommendations, to convert the Middle States Association into a business or civic organization. Matters of business ethics and activities are best left to the proprietary institutions themselves and the associations of which they now are members.

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(1) The intent of this sub-section is to assure that a governing body includes individuals who do not necessarily represent the interests of the administration, faculty or students, or of the proprietors. "Broadly" means that such representation is not merely a token representation but representation which has an effective, although not necessarily a majority, voice in the affairs of the governing body.

We propose that the traditional goals of the Middle States Association be maintained. We believe that our recommendation will permit the Association to broaden its educational horizon by supplying accreditation and other educational services to an expanded institutional community. At the same time, the Middle States Association will have to employ and train for its executive staff the necessary personnel to meet these new circumstances.

Respectfully submitted,

R Lee Hornbake

R. Lee Hornbake, *Chairman*
Committee on Proprietary Institutions